UNITED STATES OF AMERICA	)	
	)	
v.	)	**Prosecution Response to**
	)	**Defense Motion to Dismiss**
Manning, Bradley E.	)	**for Unlawful Pretrial Punishment**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**17 August 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The United States respectfully requests that the Court deny the Defense Motion to Dismiss for Unlawful Pretrial Punishment (Defense Motion).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. *See* Manual for Courts-Martial (MCM), United States, Rule for Court-Martial (RCM) 905(c) (2012). The Defense bears the burden of establishing an entitlement to sentence credit because of a violation of Article 13. *See United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) (citing RCM 905(c)(2)).[1]

WITNESSES/EVIDENCE

The United States requests that the Court consider the listed enclosures and Charge Sheet.

The United States may call the following witnesses to testify during the Article 13, UCMJ (Article 13) hearing:

1. CWO4 James Averhart, Brig Officer, Security Battalion, 29 July 2012 to 15 January 2011
2. CWO2 Denise Barnes, Brig Officer, Security Battalion, 15 January 2011 to Transfer to JRCF (19 April 2011)
3. MSgt Craig Blenis, Programs Chief, 29 July 2010 to Transfer to JRCF
4. CPT Joseph Casamatta, Commander, HHC, USAG, 29 July 2010 to 1 July 2012
5. Col Daniel Choike, Commander, MCBQ, 29 July 2010 to Transfer to JRCF
6. LCpl Jonathan Cline, Guard/Escort, during Incident on 18 January 2011
7. COL Carl Coffman, Commander, USAG, Ft Myer, 29 July 2010 to Present
8. GySgt William Fuller, Admin Chief, 29 July 2010 to Transfer to JRCF

[1] The nonbinding precedent cited by the Defense discusses the standard the Defense must meet to raise the issue, not decide the issue. *See United States v. Scaralone*, 52 M.J. 539, 543-44 (N-M. Ct. Crim. App. 1999) (citing *United States v. Cordova*, 42 C.M.R. 466 (A.C.M.R. 1970) ("To raise the issue [of a violation of Article 13], the burden is on the appellant to present evidence to support his claim of illegal pretrial punishment. Once an appellant successfully does that, the burden then shifts to the Government to present evidence to rebut the allegation 'beyond the point of . . . inconclusiveness.'") (emphasis added). Accordingly, the Defense, as the moving party, bears the burden to prove a factual matter by a preponderance of the evidence. *See King, supra.*

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9. CWO5 Abel Galaviz, Head, Corrections Section, PP&O, PS Division, PSL Branch, 29 July 2010 to Transfer to JRCF
10. SSG Ryan Jordan, Army Liaison at MCBQ, 29 July 2010 to Transfer to JRCF
11. MSgt Brian Papakie, Brig Supervisor, 29 July 2010 to Transfer to JRCF
12. CAPT Jonathan Richardson, Medical Officer at TFCF, 27 May 2010 to 28 July 2010 (Kuwait)
13. LTC Robert Russell, General Psychiatrist at MCBQ, April 2011
14. Mr. Joshua Tankersly, Guard/Escort, during Incident on 18 January 2011
15. GM2 Terrance Webb, Duty Brig Supervisor, during Incident on 18 January 2011
16. LCDR Eve Weber, Medical Officer at TFCF (Kuwait), 27 May 2010 to 28 July 2010
17. 1SG Bruce Williams, 1SG, HHC, USAG, 29 July 2010 to Present

FACTS

The United States stipulates that the accused has been held in pretrial confinement since 29 May 2010 and that the accused's pretrial confinement totaled 791 days as of the filing of the Defense Motion, including the day of filing of Defense Motion.[2]

The Defense did not contest the accused's suicide watch status at the Theater Field Confinement Facility (TFCF) in Kuwait. The Defense did not contest the accused's custody classification at the TFCF, including the accused's "Maximum" (MAX) custody classification.

The United States stipulates that the accused was placed in MAX custody and Prevention of Injury (POI) or Suicide Risk (SR) status during his confinement at the Marine Corps Base Quantico (MCBQ) Pretrial Confinement Facility (PCF) [hereinafter "Brig"], which totaled 264 days, excluding the day he departed for the Joint Regional Confinement Facility (JRCF) at Fort Leavenworth, Kansas on 19 April 2011.[3]

The United States disputes that the accused's confinement at the Brig was tantamount to solitary confinement.[4]

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[2] The United States stipulates that pretrial confinement began on 29 May 2010. The accused was arrested on 27 May 2010.

[3] Throughout his confinement, the accused regularly underwent determinations to decide the conditions of his confinement. The first, "classification," set accused's custody level. The second, "status," determined additional restrictions. The accused's status was either POI or SR throughout his confinement at the Brig. SR is the equivalent of suicide watch at other confinement facilities and in military jurisprudence. POI is a lower, less restrictive status than SR. Classification and status are separate standards but can be based on the same factors.

[4] The Defense fails to provide evidence for many of the facts it alleges. In particular, the Defense fails to cite any evidence in support of its alleged facts in paragraphs 9, 17, 24, 33, 34, 35, 36, 37, 38, 43, 44, 47, 48, 50, 51, 52, 54, 60, 67, 71, 73, and 79. The Defense provides citations for only some of its alleged facts in paragraphs 10, 11, 12, 13, 16, 18, 25, 26, 27, 28, 29, 30, 31, 32, 40, 45, 46, 49, 53, 55, 56, 57, 59, 66, 68, 69, 74, 75, 76, 77, and 78. Only for paragraphs 14, 15, 19, 20, 21, 22, 23, 39, 41, 42, 58, 61, 62, 63, 64, 65, 70, and 72 does the Defense provide citations for all of its alleged facts. Many of the facts alleged in the motion are apparently based on statements proffered by the Defense without a source.

The United States stipulates to Defense Motion ¶ 14. MAX Custody entailed the following restrictions:

> 1) Supervision must be immediate and continuous. A DD 509, Inspection Record of Prisoner in Segregation, shall be posted by the cell door and appropriate entries made at least every 15 minutes.
>
> 2) They shall not be assigned to work details outside the cell.
>
> 3) They shall be assigned to the most secure quarters.
>
> 4) Two or more staff members shall be present when MAX prisoners are out of their cells.
>
> 5) MAX prisoners shall wear restraints at all times when outside the maximum-security area and be escorted by at least two escorts (confinement facility staff or certified escorts, per article 7406).
>
> 6) On a case-by-case basis, the CO/OIC/CPOIC may authorize additional restraint for movement of specific MAX prisoners. A military judge may direct that restraints be removed from a person in the courtroom if, in this judge's opinion, such restraint is not necessary. In all cases, the limitations of article 1102 of reference (b) shall be observed.
>
> 7) Inmates must be under observation of a supervisor of the same sex.
>
> 8) Such prisoners shall be berthed in special quarters and physically checked every 5 minutes.

Initially, on 2 August 2010, the accused was classified as being in MAX custody and on SR with the following handling instructions:

> 1) The accused will wear restraints and be escorted according to custody classification when leaving his cell. The [Duty Brig Supervisor (DBS)] will be notified prior to the accused moving outside any area outside Special Quarters. Control Center Supervisor will commence facility lockdown.
>
> 2) The accused is authorized recreation call; is authorized television call; is authorized library call; is not authorized to conduct calisthenics in his cell.
>
> 3) The accused is authorized to make/receive phone calls.
>
> 4) The accused is authorized weekend/holiday visitation in a non-contact booth.
>
> 5) The accused is not authorized to lie on rack between reveille and taps unless on medical bed rest. Bed rest will be verified by a profile from medical personnel.

6) The accused is authorized to speak to occupants of other cells in a low conversational tone.

7) The accused it not authorized to keep any gear inside his cell with the exception of; one rules and regulations, one religious book, one toilet paper roll, one mattress, one underwear, and one POI blanket.

8) The accused will remain in his cell during fire drills unless otherwise directed by the Brig commanding officers, operations chief, or DBS.

9) The accused will come to the position of attention in front of hatch upon entry of any commissioned officer and will remain at attention until told to carry on. The accused will address all duty personnel (enlisted) by their rank at parade rest. The accused will be required to stand at the position of attention for count until carry on is sounded.

10) The accused will eat in his cell with a metal spoon/plastic utensils only.

11) The accused will have sick call, medication call, and chaplain visits conducted at cell hatch. Command and legal visits will be conducted at his cell or in a non-contact booth.

12) The accused will receive correspondence material from 2020-2120 to include mail, legal papers, letter paper, envelopes, DD510 Forms, and one pencil or pen.

13) The accused will receive hygiene items in accordance with the [plan of the day] only.

See Enclosure 1 at 5. After the accused's status was downgraded to POI, his custody was still MAX and his handling instructions were:

1) The accused will wear restraints and be escorted according to custody classification when leaving his cell. The DBS will be notified prior to the accused moving outside any area outside Special Quarters. Control Center Supervisor will commence facility lockdown.

2) The accused is authorized recreation call; is authorized television call; is authorized library call; is not authorized to conduct calisthenics in his cell.

3) The accused is authorized to make/receive phone calls.

4) The accused is authorized weekend/holiday visitation in a non-contact booth.

5) The accused is not authorized to lie on rack between reveille and taps unless on medical bed rest. Bed rest will be verified by a profile from medical personnel.

6) The accused is authorized to speak to occupants of other cells in a low conversational tone.

7) The accused it not authorized to keep any gear inside his cell with the exception of; one rules and regulations, one mattress, and one set PT gear (during hours of reveille). The accused will receive one POI blanket during the hours of taps.

8) The accused will remain in his cell during fire drills unless otherwise directed by the Brig commanding officers, operations chief, or DBS.

9) The accused will come to the position of attention in front of hatch upon entry of any commissioned officer and will remain at attention until told to carry on. The accused will address all duty personnel (enlisted) by their rank at parade rest. The accused will be required to stand at the position of attention for count until carry on is sounded.

10) The accused will eat in his cell with a metal spoon only.

11) The accused will have sick call, medication call, and chaplain visits conducted at cell hatch. Command and legal visits will be conducted at his cell or in a non-contact booth.

12) The accused will receive correspondence material from 2020-2120 to include mail, legal papers, letter paper, envelopes, DD510 Forms, and one pencil or pen.

13) The accused will receive hygiene items in accordance with the [plan of the day] only.

14) The accused will receive a 20 minute sunshine call in the special quarters recreation yard only while the Brig officer, Brig supervisor, or operations chief is aboard the facility.

15) The accused will wear a second chance vest when leaving the facility at all times.

See id. at 7.

A. Background of Accused's Behavioral Problems Prior to Confinement

The accused exhibited behavioral problems prior to the commission of the charged acts. *See, e.g.*, Enclosure 2 at 1. Approximately three months before deploying in June 2009, the accused's supervisor went to the accused's room to check on him after he missed morning formation. *See id.* As the accused's NCOIC approached, the accused began screaming. *See id.* The accused clenched his fists, his neck and eyes bulged, his face contorted, and he yelled

numerous times. *See id.* In response, the accused NCOIC requested the accused voluntarily obtain a psychiatric evaluation. *See id.*

On 30 June 2009, the accused was scheduled for intake and mental status evaluation based on the recommendation of the accused's NCOIC because the accused had behavioral problems. *See* Enclosure 3 at 93.

On 15 September 2009 and before his deployment, the accused received behavioral health counseling. *See id.* at 90. The mental health provider described the accused as "almost rigid physically and emotionally throughout the discussion. . . ." *See id.* The accused described his family history, stating that both his parents were alcoholics. *See id.* The provider additionally noted that the accused had to rely on himself after separating from his mother, which accounted for his rigid demeanor. *See id.*

On 30 December 2009, the accused was referred to a mental health provider because the accused's command demonstrated concern over the accused's angry outbursts and inability to monitor and control his mood. *See id.* at 85. During the 30 December 2009 counseling session, the accused reported he had "issues of trust [because he had] had less than positive experiences with previous therapists." *See id.*

On 23 March 2010, the accused received additional mental health counseling. *See id.* at 81. The mental health provider noted that the accused "continue[d] to have difficulty allowing himself to relax in session and sharing his personal feelings. [The accused] appear[ed] to be filtering everything that he says and has difficulty trusting his provider." *See id.*

On 17 May 2010, the accused received a company grade Article 15 for assaulting another Soldier. *See* Enclosure 4 at 11. The accused struck a fellow Soldier with a closed fist on 8 May 2010. *See id.* at 3. In part, the accused's punishment included reduction to the grade of E-3. *See id.* at 15. As a result of the assault, the accused presented for a mental health examination. *See* Enclosure 3 at 66. CPT Critchfield conducted the mental health evaluation. *See id.* at 66-67. During the mental health evaluation, the accused described his mood as "lost," denied any current or history of suicidal or homicidal behavior, and reported having a good support system. *See id.* at 66.

B. Pretrial Confinement in Iraq and Kuwait

The United States stipulates to the charges in Defense Motion ¶ 7. *See* Charge Sheet. The United States disputes that the accused was held in conditions tantamount to solitary confinement.

The United States stipulates to Defense Motion ¶ 8.

On 27 May 2010, the accused was placed under arrest in his containerized housing unit (CHU) at Forward Operating Base (FOB) Hammer. *See* Enclosure 5 at 3.

i. Threat to National Security

Between 1 November 2009 and 27 May 2010, the accused stole, purloined, or converted over 700,000 government documents, the majority of which were classified, and disclosed a majority of them to unauthorized persons during a time of war. *See* Charge Sheet.

On 28 May 2010 and while under arrest in his CHU, the accused asked SPC Schwab to check his personal email, even though he was ordered not to access computers and was under constant guard. *See* Enclosure 6 at 1; *see also* Enclosure 7 (stating in transfer documents to the Brig that the accused "managed to hand a piece of paper with his email address and password to another Solider in his unit and asked her to check his email for him" despite the presence of his guards).

On 29 May 2010, CPT Freeburg ordered the accused into pretrial confinement. *See* Enclosure 8.

On 16 September 2010, COL Carl Coffman the Special Court-Martial Convening Authority, requested through Col Daniel Choike, Commander, Marine Corps Base Quantico, for the Brig to monitor the accused's communications with third parties while confined in at the Brig. *See* Enclosure 9. Specifically, COL Coffman requested that all the accused's phone calls, visitations, and mail be monitored, except any privileged communications. *Id.* The purpose of this request was "to prevent the possibility of future disclosures of classified information." *Id.*; *see also* Enclosure 10 at 1 (stating that commander determined the accused continued to be a threat to national security). On 17 September 2010, Col Choike responded to the request and stated the Quantico Brig would comply with the request, but highlighted that the request "does represent a departure from [the Brig's] normal procedures" because they did not normally monitor communications. *See* Enclosure 11.

On 17 September 2010, the United States notified the Defense that "the United States will be monitoring and/or recording all communications by the accused with another party to prevent the disclosure of classified information, except for privileged communications with the Defense team, the accused's behavioral health providers, and Brig chaplains." *See* Enclosure 12 at 2. On 18 September 2010, the Defense responded and acknowledged the monitoring. *See id.* at 1. The accused acknowledged the monitoring in writing, and the Defense affirmed the accused's understanding. *See* Enclosure 13 at 63; Enclosure 12 at 1.

As of 1 August 2011, most Department of State information that had been compromised had not yet been divulged publicly. *See* testimony of Ms. Catherine Brown at 7 June 2012 Article 39(a) (discussing the Chiefs of Mission reviewing purported Department of State material that had yet to be released for potential impact).

ii. Suicide Watch at TFCF

On 28 May 2010, CPT Critchfield, based on the accused's "history of unstable mood and impulsive behavior, in addition to increased stressors," determined that the accused presented a "[h]igh risk for suicidal, homicidal, or AWOL" behavior. *See* Enclosure 3 at 62.

On 1 June 2010, the TFCF placed accused in "Medium" custody after receiving a score of 7 on DD Form 2711 for his initial custody classification. *See* Enclosure 14 at 2.

A few days after entering pretrial confinement on 2 June 2010 at the TFCF, the accused collapsed in his cell during a conversation. *See* Enclosure 15 at 1.

On 30 June 2010, the accused became unresponsive to commands from TFCF personnel and began "yelling uncontrollably." *See* Enclosure 16. The accused refused an order to return to his cell from CAPT Balfour, the TFCF Mental Health Officer, and "lost complete control by screaming, shaking, and babbling. [The accused] began to bang the back of his head against the adjacent cell." *See id.* MA3 Murphy, who was assigned to keep constant watch of the accused, noted the accused remained on the floor, banging the back of his head and mumbling. *See id.*

On 30 June 2010, the accused was reclassified to MAX custody because he received a score of 12. *See* Enclosure 14 at 3. The accused "continued to display inappropriate behavior," including creating a noose with his bed sheet. *See id.*; Enclosure 17 at 98-103.

On 2 July 2010, the accused was assessed again by LCDR Weber and CAPT Richardson, both psychiatrists. *See* Enclosure 3 at 57. CAPT Richardson noted that the accused had been placed on one-to-one watch because he had become psychologically imbalanced as a result of stress. *See id.* (stating that the accused suffered decompensated). CAPT Richardson also stated that the accused "had made a noose and had reportedly collected several items that could potentially be used for possible self harm i.e. metal." *See id.*; Enclosure 17 at 98-103. CAPT Richardson further stated that the accused's "reliability in terms of expressing suicidal ideation was felt to be poor and concerning." *See* Enclosure 3 at 58. Ultimately, CAPT Richardson determined:

> Immediate risk of self harm is still considered to be elevated/high due to his poor reliability, inability or lack of desire to adequately express thoughts in regards to [suicidal ideations], not contracting for safety, having made a noose and gathered items that had potential to harm self. Additionally, his regressed behavior and poor ego strength exacerbate the risk.

See id. at 59. Finally, CAPT Richardson suggested that transfer to another facility with better resources to manage the complexities of the accused's condition was being considered. *See id.*

On 4 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm or harm to others was "elevated/high." *See* Enclosure 3 at 55. CAPT Richardson recommended continuing one-to-one observation and added that "[a]lthough [the accused] may seem better (i.e. he is not yelling, crying in regressed posture), he is still very fragile and could decompensate quickly." *See id.* at 55.

On 6 July 2010, LCDR Weber assessed the accused, determining that "[i]mmediate risk for self harm or harm to others is considered to be elevated/high." *See id.* at 51. LCDR Weber stated that the accused "consider[ed] suicide a salient option when he feels stressed." *See id.* LCDR Weber recommended continuing one-to-one observation. *See id.*

On 8 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm or harm to others was "elevated/high." *See id.* at 48. CAPT Richardson recommended continuing one-to-one observation and segregation by himself for safety and suicide prevention. *See id.* CAPT Richardson added that "[a]lthough [the accused] may superficially seem calmer, due to his poor ego strength, demonstrated poor coping mechanisms, unpredictable behavior, and poor reliability in regards to discussing his risk . . . it is recommended that [the accused] continue with segregation and in a cell by himself with 1:1 observation for safety and suicide prevention." *See id.*

On 10 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm or harm to others was "elevated/high." *See id.* at 45. CAPT Richardson recommended continuing one-to-one observation and segregation of the accused by himself for safety and suicide prevention. *See id.* CAPT Richardson added that "[a]lthough [the accused] may superficially seem calmer, due to his poor ego strength, demonstrated poor coping mechanisms, unpredictable behavior, and poor reliability in regards to discussing his risk . . . it is recommended that he continue with segregation and in a cell by himself with 1:1 observation for safety and suicide prevention." *See id.* (ellipsis in original). CAPT Richardson noted that, in response to the question of whether he wanted to kill himself, the accused stated, "not right now," adding that "it is always an option." *See id.* at 44. Also, the accused would not commit to the staff that he would not harm himself. *See id.* (stating that the accused would not contract with the staff for his safety).

On 12 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm or harm to others was "even more increased than before (more elevated/high)." *See id.* at 42. The accused told CAPT Richardson that he would take his life if he could because he wanted death and did not want pain. *See id.* at 41. The accused reported that he was at peace with the option of dying. *See id.* The accused added that he was a patient man, which indicated to CAPT Richardson that the accused could wait until the time was right. *See id.* CAPT Richardson recommended continuing one-to-one observation, line of sight, alertness, and segregation by himself for safety and suicide prevention. *See id.* at 42.

On 14 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm or harm to others was "elevated/high." *See* Enclosure 3 at 39. CAPT Richardson recommended continuing one-to-one observation and segregation by himself for safety and suicide prevention. *See id.* at 39. CAPT Richardson also noted that the accused's reliability was still poor. *See id.*

On 16 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm or harm to others was "elevated." *See id.* at 36. CAPT Richardson noted that the accused consented to communication with mental health providers at the accused's next facility for continuity of care. *See id.* at 35. CAPT Richardson described the accused's frustration with suicide precautions and new claim that he would not harm himself. *See id.* at 35-36. CAPT Richardson determined that the accused changed his claim that he would not harm himself because he was frustrated with the suicide precautions. *See id.* CAPT Richardson based his determination on the accused's poor reliability, having made two nooses, saying he would be "patient," and saying he would kill himself if he knew he could be successful. *See id.* at 36.

On 19 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm or harm to others was "elevated." *See id.* at 32. CAPT Richardson recommended continuing one-to-one observation and segregation by himself for safety and suicide prevention. *See id.* at 33. CAPT Richardson described the accused's frustration with suicide precautions and claim that he would not harm himself. *See id.* at 32-33. The accused expressed irritation when claiming he would not harm himself. *See id.* at 31. CAPT Richardson determined that the accused changed his claim that he would not harm himself because he was frustrated with the suicide precautions and wanted a change in status and detainee uniform. *See id.* at 32-33. CAPT Richardson based his determination on the accused's poor reliability and inconsistency, having made two nooses and being deceitful about them, saying he would be "patient," and saying he would kill himself if he knew he could be successful. *See id.* CAPT Richardson also based his determination on the accused's fragile ego, which could easily decompensate. *See id.* at 33. CAPT Richardson also noted that the accused's status had been "thoughtfully considered" and discussed with LCDR Weber and CAPT Balfour. *See id.* at 32-33.

On 21 July 2010, LCDR Weber assessed the accused, determining that the risk for self harm or harm to others was "elevated." *See id.* at 29. LCDR Weber recommended continuing one-to-one observation and segregation. *See id.*

On 24 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm was "too high" to downgrade his status to a visual check every fifteen minutes. *See id.* at 23. CAPT Richardson recommended continuing suicide watch, one-to-one observation, and segregation by himself for safety and suicide prevention. *See id.* CAPT Richardson described the accused's frustration, anger, and irritability. *See id.* CAPT Richardson added that "[a]lthough at times [the accused] may seem better, there is a large amount of mood liability, splitting and potential manipulation, in conjunction with low ego that contribute to the decision [to maintain the] level of precaution." *See id.* at 24.

On 28 July 2010, CAPT Richardson assessed the accused, determining that the risk for self harm was "high." *See id.* at 19. CAPT Richardson based his assessment on the accused's "poor ego strength, his significant legal and disciplinary stressors, recurrent suicidal thoughts, strong sense of hopelessness, past gestures with preparing nooses, and stating he would not tell anyone if he did decide to take his life." *See id.* at 19.

The United States stipulates to Defense Motion ¶ 9; however, the United States does not stipulate that Defense Motion ¶ 9 presents an exhaustive or complete description of the accused's mental state.

The accused was transported from the TFCF to MCBQ on 29 July 2010.

On 29 July 2010, LCDR Barr completed a memorandum summarizing the accused's confinement at TFCF. *See* Enclosure 18. The memorandum detailed the accused's anxiety attacks and behavior problems, including running around in circles, lying down, and refusing to stand up, which forced the cadre to carry to him to his cell. *See id.* The memorandum also stated that the accused was found curled up in cell with a bed sheet tied into a noose next to him

on the floor. *See id.* The Brig received this memorandum and was aware of the accused's history at the TFCF, including his suicide watch status. *See* Enclosure 7.

C. The Brig

i. Accused's Detention until January 2011

The United States stipulates that the Brig was very concerned about the accused's safety. *See* Defense Motion ¶ 11. The United States stipulates that a suicide occurred at the Brig on 31 January 2010. The detainee who committed suicide had been confined at the Brig since August 2009 and was under the care of CAPT Hocter. *See* proffered testimony of CAPT Hocter. The detainee committed suicide by suffocating himself on pieces of paper and/or a sock. *See* proffered testimony of CWO4 Averhart, MSgt Papkie.

The United States disputes Defense Motion ¶ 10. Upon initial custody classification at the Brig on 29 July 2010, the accused was placed in MAX custody because the accused met all four administrative factors of suicide risk, physical health problem, mental health problem, and special quarters; the Duty Brig Supervisor (DBS) also cited the accused's suicide watch for multiple months in Kuwait. *See* Enclosure 19 at 1. The accused received a score of 5 and the DBS overrode the initial screening decision based on the accused's confinement at the TFCF. *See id.*

The classification sheet also documented that the accused had mental health problems, had assaulted another person, had thought about committing suicide, had made a plan to commit suicide, and was taking medications for anxiety and depression. *See id.* at 2-3. In particular, the accused wrote that he was "always planning, never acting" in the comments to explain his consideration of suicide during initial processing at the Brig. *See* Enclosure 20 at 5. The United States stipulates that the accused was initially placed on SR at the Brig.

The United States disputes Defense Motion ¶ 11. The United States stipulates to CAPT Hocter's experience and duty title. The United States stipulates that the accused's suicide watch in Kuwait was a factor for placing him on SR at Quantico. CAPT Hocter recommended placing the accused on SR on 30 July 2010 because he assessed the accused as posing a threat to himself, requiring further mental evaluation, needing to be segregated from general population, having a low tolerance of frustration and stress, and the accused's status at the TFCF. *See* Enclosure 21 at 1. On 2 August 2010, after meeting with the accused on 30 July 2010, CAPT Hocter noted that he considered the accused a "high risk." *See* Enclosure 3 at 16. The United States stipulates that CAPT Hocter sought a consultant. The United States stipulates that CAPT Hocter's desire for a consultant was a factor in originally adding COL Malone as a second opinion.

The United States stipulates that COL Malone and CAPT Hocter recommended placing the accused on POI status on 6 August 2010. CAPT Hocter determined that the accused still presented "substantial risk," posed a threat to himself, required further mental evaluation, needed to be segregated from general population, and had a low tolerance of frustration and stress. *See* Enclosure 21 at 2. CAPT Hocter also directed that the accused not be permitted to have bootlaces, belts, and trash bags. *See id.*

The United States stipulates that the accused's status was changed from SR to POI on 11 August 2010 after the Classification and Assignment (C&A) Board's recommendation. *See* Enclosure 22 at 5.

The United States disputes Defense Motion ¶ 12. The United States stipulates that the accused was observed by the Brig staff and received regular psychiatric treatment. The United States stipulates that the accused did not receive any disciplinary reports during the three week period cited by the Defense Motion. The United States disputes that the accused's behavior was exemplary. The United States stipulates that the accused stated he would like a job in the library, if possible.

On 20 August 2010, CAPT Hocter recommended maintaining POI, citing his belief that the accused posed a threat to himself and required further mental evaluation. *See* Enclosure 21 at 3.

The United States responds to Defense Motion ¶¶ 14-19 *infra*.

The United States disputes Defense Motion ¶ 20. On 27 August 2010, CAPT Hocter recommended removing the accused from POI and noted that COL Malone concurred. *See* Enclosure 21 at 4. CAPT Hocter maintained his belief that the accused should be removed from POI until 10 December 2010 when he recommended placing the accused on POI because the accused was "under a great deal of stress." *See id.* at 15. CAPT Hocter recommended removing the accused from POI on 13 December 2010. *See id.* at 17. CAPT Hocter recommended removing the accused from POI until 18 January 2011 when he recommended placing the accused on POI. On 21 January 2011, COL Malone recommended removing the accused from POI. On 6 April 2011 and 15 April 2011, LTC Robert Russell recommended keeping the accused on POI. *See id.* at 31, 33.

The accused's psychiatrists gave different recommendations throughout their treatment of the accused during his confinement at the Brig. *See id.* On some occasions, the psychiatrists stated that POI was not required, but on others the psychiatrists stated that the accused should be removed from POI. *See, e.g., id.* at 12, 17 (stating that the accused was "OK for removal from POI"); *but see id.* at 13, 18 (recommending explicitly to remove the accused from POI).

The United States stipulates that Defense Motion ¶ 21 represents the contents of CAPT Hocter's 7 April 2011 affidavit. The United States disputes note 3 because it does not cite to a Brig procedure.

The United States stipulates that Defense Motion ¶ 22 represents the contents of CAPT Hocter's 14 April 2011 supplemental affidavit.

The United States stipulates that Defense Motion ¶ 23 represents the contents of COL Malone's affidavit.

The United States disputes that Brig staff ignored the recommendations of CAPT Hocter and COL Malone as stated in Defense Motion ¶ 24. The Brig commanding officers, who are ultimately responsible for the accused's safety as commanders, considered the recommendations and elected to maintain the accused's status as POI for his safety. *See* proffered CWO4 Averhart; *see also* Enclosure 23 (stating that the Brig commanding officer placed the accused on SR based on the accused's conduct).

COL Malone described the accused's anxiety disorder as being in remission during February through April 2011. *See* Enclosure 21 at 27-30, 32.

The United States disputes the characterization that the accused was a model detainee in Defense Motion § E and ¶ 25. The United States stipulates to the content of the entries in Defense ¶ 25; however, the Defense omits unfavorable entries. *See, e.g.*, Enclosure 24 at 10 (stating that the accused was counseled for disrespect and adherence to customs and courtesies).

On 23 November 2010, GySgt Blenis asked staff members about the accused's behavior while senior staff were not present. *See* Enclosure 22 at 46. The staff reported that the accused had been observed licking the bars in his cell after taps; sword fighting imaginary characters in his cell; lifting imaginary weights in his cell, displaying actual strain and exertion; and making faces in the mirror for extended periods of time. *See id.*; Enclosure 24 at 43.

On 28 December 2010, Deputy Inspector General, MCBQ, Timothy Zelek (IG) reported the findings of his inspection of the Brig on 27 December 2010. *See* Enclosure 25 at 1. The IG observed the Brig as a clean and well-lit facility. *See* Enclosure 25 at 2. All detainees at the Brig were being held in the special quarters area of the Brig in individual cells. *See id.* Due to the arrangement of the cells at the Brig, no detainee could see another detainee from his cell. *See id.* The IG also noted that a complaint system was in place and accessible to detainees. *See id.*

The IG determined that the accused's custody classification and status did not affect his location in the Brig. *See id.* at 3. The IG's report further observed that the Quantico Brig's Standard Operating Procedures (Brig SOP) prevented any detainee from exercising in his cell. *See id.* at 4. Exercise presented a risk of harm to the accused. *See* proffered testimony of CWO5 Galaviz. The IG's report listed the accused's privileges, to include his ability to read magazines, books, or write letters; his television privileges; telephone privileges; recreation call; and correspondence privileges. *See id.* at 4-5. Finally, the IG determined that the publicity surrounding the accused's confinement was, at best, speculative and not founded on any clear and convincing facts. *See id.* at 5.

ii. The accused, through Defense counsel, officially states grievances in January 2011

On 19 August 2010, the accused told his chain of command that the guards and Brig had treated him "very professionally." *See* Enclosure 26 at 2. The accused further stated that he had received the Inmate Handbook, received an in-brief by the staff, and understood the Inmate Grievance Process. *See id.* The accused continued to receive command visits throughout his confinement at the Brig. *See* Enclosure 26. The accused generally described the guards' and

facility's treatment of him as "professional" and "excellent" and attested to each of these statements on each command visit checklist. *See id.*

The accused began documenting his grievance regarding his POI status in January 2011. The accused filed a complaint on a DD Form 510 on 5 January 2011, thereby complying with the Brig grievance process. *See* Defense Motion ¶ 74. Also, the accused, though Defense counsel, filed a request for release under RCM 305(g) on 13 January 2011. *See* Defense Motion ¶ 75. The United States stipulates that COL Coffman denied the RCM 305(g) request on 21 January 2011. Furthermore, the accused filed a request for redress under Article 138, UCMJ (Article 138) on 19 January 2011. *See* Defense Motion ¶ 76. The accused did not seek redress from the military magistrate.

The accused filed two complaints of wrongs under Article 138. *See* Enclosure 27; Enclosure 28. The accused filed his first complaint on 19 January 2011. *See* Defense Motion ¶ 76. Col Oltman and CWO4 Averhart each filed a response on 24 January 2011. *See* Enclosure 29 at 1; Enclosure 30. Col Choike filed responses on 1 March 2011 and 8 April 2011. *See* Enclosure 27 at 1; Enclosure 28 at 1. Two of the responses to the Article 138 complaint determined no relief was appropriate and therefore denied the request for redress.[5] *See* Enclosure 30; Enclosure 27 at 5-6; Enclosure 28 at 6-7. Assistant Secretary of the Navy Garcia took final action and determined that the accused's claim lacked merit on 9 September 2011. *See* Enclosure 31.

On 14 January 2011, the accused first notified his command representative of issues he had with the Brig. *See* Enclosure 26 at 50. On 14 January 2011, the accused himself raised a grievance about his POI status with his command for the first time during a command visit. *See id.* The accused had not raised the issue of his POI status in the weekly command visits that began on 19 August 2010. *See id.* at 1-50. The accused raised the issue of his POI status again with his command during a command visit on 20 January 2011. *See id.* at 52. The accused continued to describe his treatment by the guards and facility favorably. *See id.* (telling a command representative that his treatment was decent on 20 January 2011). On 28 January 2011, the accused told the command representative that he understood the grievance process and had not had to use it. *See id.* at 55. Throughout the months of February and March 2011, the accused continued to report that the guards and facility were treating him well and that he understood but had not had to use the grievance process. *See id.* at 57-81.

The United States stipulates that Defense Motion ¶¶ 26-28 reflect portions of SECNAVINST 1640.9C.

The United States disputes Defense Motion ¶ 29. The United States stipulates that the C&A Board consistently recommended maintaining the accused in MAX custody and on POI status and that the Brig Commander always approved the C&A Board recommendation. The C&A Board based its recommendations, in part, on the accused's behavior during his confinement at the Brig. *See* proffered testimony MSgt Blenis, GySgt Fuller, SSG Jordan.

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[5] The Defense states that three responses denied the request for redress; however, CWO4 Averhart responded as a respondent. Therefore, he did not deny the request for redress because his position as a respondent did not permit him to take such action. *See* U.S. Department of Navy Instruction 5800.7F (JAGMAN), Art. 0302 (26 June 2012).

The United States stipulates that the C&A Board met weekly but did not document its recommendations on Brig Form 4200 after 29 July 2010 until 3 January 2011 as asserted in Defense Motion ¶ 30. However, the C&A Board's recommendations were documented in the Brig Commander's weekly progress reports. *See* Enclosure 22 at 1-63.

CWO4 Averhart issued weekly progress reports, which noted that the C&A Board continued to meet. *See* Enclosure 22 at 1-63. CWO4 Averhart considered the recommendation of the C&A Board and made a determination that considered the Board's recommendation. *See* proffered testimony of CWO4 Averhart; Enclosure 22 at 1-63. CWO4 Averhart's reports documented the C&A Board's findings that the accused remain on POI throughout the accused's confinement. *See id.* Additionally, CWO2 Barnes's weekly progress reports also documented the recommendations of the C&A Board that the accused remain on POI throughout the accused's confinement. *See id.* CWO4 Averhart and CWO2 Barnes based their determinations on multiple factors, to include, *inter alia*, the accused's mental health evaluation, including counselor notes; the accused's history and behavior; and any other available information. *See* proffered testimony of CWO4 Averhart, CWO2 Barnes; *see, e.g.*, Enclosure 22; Enclosure 29.

The United States stipulates that the C&A Board documentation shows unanimous recommendations that the accused remain in MAX custody and POI as noted in Defense Motion ¶ 31. The C&A Board made recommendations based on the independent judgment and assessments of the C&A Board members. *See* proffered testimony of MSgt Craig Blenis, GySgt Fuller, and SSG Jordan.

iii. The accused suffers an apparent anxiety attack and is placed on SR

The United States disputes Defense Motion ¶¶ 32-36. The United States stipulates that the accused was placed on SR on 18 January 2011. On 19 January 2011, the C&A Board recommended assigning the accused SR based on the following higher custody factors: disruptive behavior, low tolerance of frustration, poor home conditions or family relationships, and potential length of sentence. *See* Enclosure 32 at 6. The C&A Board noted the 18 January 2011 psychiatric recommendation to place the accused on POI. *See id.*

On 20 January 2011, the accused was placed on POI by the DBS.[6] *See* Enclosure 24 at 24-25. On 21 January, the C&A Board recommended continuing assigning the accused to POI. *See* Enclosure 32 at 7 (noting that the accused's status was POI and recommending POI going forward). In the remarks section of both the 19 January and 21 January reports, the C&A Board noted that the accused had previously demonstrated suicidal ideations and gestures, had demonstrated erratic behavior on 18 January 2011, had a pending 706 sanity board hearing, had an anxiety attack, and had acted aggressively toward himself in the presence of the Brig OIC and Supervisor. The United States stipulates that the accused relinquished his glasses and clothing, except his underwear, at night while on SR. *See* Enclosure 1 at 16.

[6] The Defense states that the accused was removed from SR on 20 January 2011 in Defense Motion ¶ 123, but states the accused was removed from SR on 21 January 2011 in Defense Motion ¶ 32. The United States stipulates to 20 January 2011 as the date the accused was removed from SR. *See* Enclosure 24 at 24-25.

The accused had been required to wear restraints since his arrival on 29 July 2010. *See* Enclosure 1 at 1. The accused had been granted his full hour of recreation call since 10 December 2010. *See* Defense Motion ¶ 8(h). The normal procedure for the accused to go to his recreation call required the accused being placed in restraints. *See* Enclosure 1 at 5. The accused had also been addressing the guards by title and name since his arrival. *See* Enclosure 1 at 2 (stating the rules for addressing Brig personnel as initialed by the accused). Before 1000 hours on 18 January 2011 and per the Brig's SOP, LCpl Tankersly put the accused in full restraints in preparation for recreation call.[7] *See* Enclosure 33 at 1. GM2 Webb, as DBS, was also present. *See* Enclosure 34 at 2.

Upon walking out of his cell, the accused stopped and started looking around. *See* Enclosure 33 at 1. In response, LCpl Tankersly told the accused to face the door. *See id.* The accused complied but failed to acknowledge the order as he had been required to do since his arrival. *See* Enclosure 1 at 2 (defining manner in which the accused addresses the Brig staff upon the accused's indoctrination on 29 July 2010); Enclosure 33 at 1. LCpl Tankersly then instructed the accused that he was to respond to a guard's order by replying, "Aye, aye, (rank of person)." The accused replied, "No, wait," because he claimed he did not understand. *See* Enclosure 34 at 1; *see also* Enclosure 33 at 3 (recounting that the accused yelled, "No, stop," which caused GM2 Webb to instruct the accused to calm down). The accused had received a briefing during his indoctrination in August 2010 that explained the manner in which he was to respond to the guards. *See* proffered testimony of MSgt Papakie. The accused had not had difficulty understanding the manner in which he was to respond to the guards prior to 18 January 2011. *See* proffered testimony of Brig staff. GM2 Webb explained when addressed by a staff member that the accused must respond using rank or title and asked if the accused was ready to continue to recreation call. *See* Enclosure 34 at 1. The accused stated that he understood. *See id.* At this point, GM2 Webb, LCpl Tankersly, and LCpl Cline escorted the accused to recreation call.[8] *See id.*

Upon arrival at the recreation room, LCpl Tankersly ordered the accused to remain still. *See id.* After the first order, the accused did not respond and was counseled again. *See* Enclosure 33 at 3. The accused responded by saying, "Aye, Lance Corporal." *See* Enclosure 34 at 1. LCpl Cline saw the accused begin to shake. *See* Enclosure 33 at 3.

Once the restraints were removed, the accused fell to the floor. *See* Enclosure 34 at 1; Enclosure 33 at 3. GM2 Webb and LCpl Tankersly reached out to help the accused, but the accused refused their help, jumped up, and ran behind an exercise machine. *See* Enclosure 34 at 1; Enclosure 33 at 3. While behind the machine, the accused covered his face and appeared distraught. *See* Enclosure 34 at 1 (describing the accused as mumbling at first and then yelling, "I'm sorry GM2. I'm sorry LCpl."); Enclosure 33 at 3 (describing the accused as crying and saying "Leave me alone.").

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[7] GySgt Fuller was called to the dormitory on or about 1000 hours to assist at the end of the events described *infra*. *See* Enclosure 33 at 4; Enclosure 34 at 1.

[8] The facility was also placed in lockdown per the normal procedure to move a MAX custody inmate. *See* Defense Motion ¶ 18(d).

After the accused ran behind the exercise machine, GM2 Webb called the security chief, GySgt Fuller, who came to the recreation room. *See* Enclosure 33 at 3. GM2 Webb instructed LCpl Cline to grab a chair for the accused so he could sit and begin to calm down. *See* Enclosure 34 at 1. GySgt Fuller arrived and GM2 Webb explained the course of events. *See id.* GySgt Fuller asked the accused if a particular event had triggered the accused's actions, and the accused replied that he did not understand why he was being treated differently. *See id.* at 1. The accused also stated that he believed the guards were anxious, which made him anxious. *See id.* at 1. Upon being asked by GySgt Fuller what could be done to help, the accused replied that he did not know. *See id.* at 1-2.

GySgt Fuller asked the accused if he wanted to continue his recreation call, and the accused expressed that he would like to continue. *See id.* at 1. GM2 Webb called two new escorts to continue the recreation call, Cpl Baldwin and LCpl Artilles, who relieved LCpl Tankersly and LCpl Cline. *See id.* at 2. The accused completed his recreation call without any further outbursts. *See id.*

The United States disputes Defense Motion ¶ 37. Around 1545 hours on 19 January 2011, MSgt Papakie asked the accused to describe the prior events. *See* Enclosure 33 at 5. The accused displayed confusion, could not complete a sentence, stuttered, and breathed heavily and fast. *See id.* MSgt Papakie asked the accused to calm down and made the accused aware of MSgt Papakie's own calm demeanor. *See* Enclosure 33 at 5. MSgt Papakie discussed the accused's fall, and the accused again became anxious and stuttered. *See id.* The accused expressed feelings of confusion regarding the guards watching him and then became frustrated and quickly moved toward the bulkhead, acting as if he were going to "punch the bulkhead." *See id.* The accused was throwing himself around his cell. *See* proffered testimony of MSgt Papakie. The accused stated he did not understand why he was on POI. *See id.* At this point, CWO4 Averhart arrived. *See id.*

CWO4 Averhart was aware of the corrective dialogue between the Brig staff and the accused. *See* Enclosure 35 at 1. CWO4 Averhart went to the accused to discuss the incident. *See id.* CWO4 Averhart questioned the accused regarding reports from the Brig staff that the accused had become anxious and displayed "labored breathing" during recreation call. *See* Enclosure 29 at 6. The accused stated he felt that CWO4 Averhart was yelling at him. *See* Enclosure 33 at 5. CWO4 Averhart explained that he has a deep voice and was not yelling. *See id.* During the conversation, the accused became upset, started to stutter and flail, and struck himself in his head "violently and aggressively." *See* Enclosure 29 at 6; Enclosure 35 at 1. After witnessing the accused's actions, CWO4 Averhart was "extremely concerned over [the] outburst." *See* Enclosure 35 at 1. Accordingly, CWO4 Averhart took immediate action and placed the accused on SR to protect the accused from self harm. *See id.*; Enclosure 29 at 7.

The United States disputes the Defense Motion's version of events in ¶¶ 37-38. CWO4 Averhart denied that he told the accused that "no one will tell [him] what to do" or that CWO4 Averhart referred to himself as "God." *See* Enclosure 35 at 1 (responding to the same allegation made by the accused, through counsel, in an Article 138 complaint). CWO4 Averhart stated that had the conversation occurred, he would have made a disciplinary report for insubordination. *See id.* Furthermore, CWO4 Averhart noted that he found the allegation of the "God" comment

offensive because, as an assistant minister in his church, he would never refer to himself as "God." *See id.* The United States stipulates that CWO4 Averhart departed and MSgt Papakie took over.

The United States stipulates that Defense Motion ¶ 39 is a mostly accurate transcription of the video with some omissions; however, the United States specifically disputes two items. First, the United States disputes the Defense Motion characterization that MSgt Papakie "chuckle[d] to himself." Second, the United States disputes the Defense Motion's failure to transcribe GySgt Blenis's comments by simply stating he "refer[red] again to PFC Manning's suicide status Kuwait [*sic*]." In this section of the video, GySgt Blenis discusses the accused's having fashioned at least one noose in Kuwait and the discrepancy between whether the accused constructed the noose from his bed sheet or sand bag ties. The audio approximately states:

> GySgt Blenis: I don't know how long after but not too much long after where they took you back to your cell, put you on suicide watch because they found a bed sheet . . . and they were asking about it . . . tied into a noose . . . of sandbag ties . . . so it wasn't a sheet. You told me that, I asked you about that the very first time we talked. You told me it was with sandbag ties, you tied your sand bags. So going back to today's situation compared to Kuwait's, I think this results in . . . see, that's why you are on suicide watch . . . we have to look at this as . . . .

See Enclosure 37 at 6:38-7:31.[9]

The Defense provides no evidence that Brig staff actions inside the Brig were at all connected with the protests that occurred at the gates of MCBQ.

On 20 January 2011, CWO4 Averhart changed the accused's handling instructions, requiring him to turn over his clothing at night. *See* Enclosure 1 at 18. CWO2 Barnes continued this handling instruction until 2 March 2011. *See id.* at 20.

On 21 January 2011, the accused requested to appear before the C&A Board. *See* Enclosure 38 at 1; Enclosure 24 at 19; Defense Motion ¶ 138. During the C&A Board, the accused told the Board that his statement regarding suicide that he was "always planning, never acting" may have been false. *See* Enclosure 24 at 19. The accused claimed that he was being sarcastic when he wrote the statement. *See id.*

Also during the Board meeting, the Board told the accused that the average length of POI is three weeks. *See id.* The Board added that the amount of time spent had been "much longer" for others, "depending on the individual and the circumstances surrounding the individual." *See id.* The Board also informed the accused that he was also receiving individualized treatment because some restrictions had been reduced contrary to normal procedure based on the accused's personal conduct. *See id.* (stating that removal of the accused's restraints during indoor recreation call while on MAX custody is not the normal procedure).

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[9] Enclosure 37 is the second half of the video. The first half of the video is included in Enclosure 36.

On 24 January 2011, CWO4 Averhart relinquished command pursuant to PCS orders and was replaced by CWO2 Barnes. Enclosure 29 at 1.

On 28 January 2011, COL Malone determined that the accused presented some risk of self harm and that the risks of POI were not further detrimental. *See* Enclosure 21 at 25. COL Malone wrote:

> Remains at moderate risk of self-harm, which is improved since arrival, would not require a higher level of psychiatric care to mitigate risk at this point. Requires routine outpatient follow-up. Frustration tolerance has improved but still somewhat below average, limited ability to express or understand his feelings.
>
> Risks and benefits of POI are not further detrimental at this time.

See id.

The United States disputes Defense Motion ¶ 40. The United States stipulates that CAPT Hocter recommended placing the accused on POI on 18 January 2011. The United States stipulates that neither CAPT Hocter nor COL Malone recommended SR on 18 January 2011.

The United States stipulates that Defense Motion ¶ 41 represents an accurate quotation of CWO5 Galaviz's findings.[10]

On 23 February 2011, CWO5 Galaviz issued a report in response to the accused's Article 138 complaint. *See* Enclosure 39 at 1. CWO5 Galaviz determined that CWO4 Averhart did not abuse his discretion by placing the accused in MAX custody, POI status, or SR on 18 January 2011. *See id.* at 1-2. However, CWO5 Galaviz noted that "steps should have been taken to immediately remove [the accused] from suicide risk" to a lower status after the medical officer determined that the accused was no longer a suicide risk. *See id.* at 2. CWO5 Galaviz recommended updating the Brig's SOP to require a detainee's status be updated to a status below SR after a finding by a medical officer that SR is no longer required. *See id.* at 3.

The United States stipulates to Defense Motion ¶ 42, stipulating that the full text of Col Choike's statement was the following:

> There is no requirement in [SECNAVINST 1640.9C] or [Brig SOP as of 1 Jul 10] that requires an immediate removal from suicide risk after the Brig mental health provider or medical officer recommends it. [Brig SOP as of 1 Jul 10] specifically requires that

[10] The attachment cited by the Defense Motion is not CWO5 Galaviz's report. Defense Motion Attachment 22 is the Deputy Inspector General's report and a memo from Col Choike requesting a review of the accused's confinement. *See* Defense Attachment 22. The United States has provided CWO5 Galaviz's Report as Enclosure 39.

> the Brig Commander approve the move from suicide risk to a lesser status."

See Enclosure 27 at 4.

The United States stipulates that Col Choike directed the Brig to update its regulation to make binding a determination by a medical officer that a detainee is no longer considered a suicide risk. *See* Enclosure 28 at 6.

iv. Accused Raises Questions Regarding His Suicidal Ideations

The United States disputes Defense Motion ¶ 43. On 28 February 2011, Cpl Sanders reiterated the procedures required by the accused's POI status, and the accused complied by relinquishing his clothing. *See* Enclosure 40. The accused had been relinquishing his clothing nightly since his handling instructions were changed on 20 January 2011. *See* Enclosure 1 at 18. The accused had two blankets at night. *See id.* at 12.

On 2 March 2011 at 1545 hours, the accused was informed of the additional charges preferred against him, including the charge of aiding the enemy, with a potential maximum sentence of confinement for life without eligibility for parole. *See* Charge Sheet.

On 2 March 2011, the accused was counseled for disobedience. *See* Enclosure 24 at 10.

Prior to Taps on 2 March 2011, MSgt Papakie discussed the accused's relinquishing his clothing because the accused claimed he did not understand the procedure. *See* Enclosure 40. After being asked if he understood, the accused stated he did not understand why he was allowed to keep his underwear "with the elastic waist band, which is probably the most dangerous piece." *See id.*; Defense Motion ¶ 43. After "chuckl[ing] briefly as if the conversation . . . [were] absurd," the accused continued to insist he did not understand the instructions. *See* Enclosure 40. MSgt Papakie inquired again stating, "Detainee Manning, do you understand that you will not question the guard staff and that you will comply when told to do so and that if you have any questions about the orders or instructions given, you are to bring it to the attention of the appropriate staff the next working day?" *See* Enclosure 40. In response, the accused stated that he understood. *See id.* Immediately thereafter, MSgt Papakie approached the Brig commanding officer, CWO2 Barnes, and expressed his concerns that the accused may have had recent thoughts or ideas about potential suicidal uses of the elastic waistband in his underwear. *See id.*

The United States disputes Defense Motion ¶ 44.

The United States disputes Defense Motion ¶ 45. The United States stipulates that the accused was not placed under SR. The United States stipulates that CWO2 Barnes made a single change in response to the accused's comment about the suicidal use of the elastic band in his underwear: CWO2 Barnes changed his handling instructions to prohibit the accused's having his underwear at night. *See* Enclosure 1 at 20.

On 3 March 2011, the accused was counseled for disrespect and adherence to customs and courtesies. *See* Enclosure 24 at 10. Later on 3 March 2011, the accused was also counseled for [using the latrine] while a female was present. *See id.*

On 4 March 2011, the accused was counseled for disrespect. *See id.*

The United States disputes Defense Motion ¶ 46. On 4 March 2011 and 11 March 2011, COL Malone assessed the accused as being a low risk of self harm and requiring routine further examination. *See* Enclosure 21 at 28-29.

The United States disputes Defense Motion ¶ 47-48. The United States stipulates that the accused turned over all of his clothing, including his underwear, from 2 March 2011 through 19 April 2011. The United States stipulates that the accused had two security blankets at night. The United States stipulates that the accused received a tear-proof suicide gown on 7 March 2011.

The United States stipulates that the accused voluntarily stood naked at parade rest only on the morning of 3 March 2011. *See* proffered testimony of Brig Staff. During the mornings after the accused relinquished his clothing and underwear, the Brig staff would return the accused's clothing and give him time to dress before morning count. *See* proffered testimony of Brig staff. The United States disputes that the accused was forced to stand at attention; the accused chose to stand naked at parade rest. *See* proffered testimony of Brig staff. 1stLt Villiard's statement was incorrect. *See* proffered testimony of CWO2 Barnes. The accused was told he did not have to stand naked at attention or parade rest. *See* proffered testimony of CWO2 Barnes.

The United States disputes Defense Motion ¶ 49. The United States stipulates to the accused's size. On 13 March 2011, the accused placed his arms inside the suicide gown. *See* Enclosure 41. The accused stood up and attempted to remove the gown over his head without undoing the hook and loop tape (Velcro) as he normally would, and was apparently unable to remove his arms. *See* Enclosure 41. The accused stated that he disliked the suicide gown. *See id.* The United States stipulates that two guards entered the accused's cell to free him.

On 15 March 2011, the accused rubbed his glasses against the bridge of his nose, using his glasses as tweezers. *See* Enclosure 42 (reporting that the accused claimed he used his glasses as tweezers to get rid of his "unibrow").

On 24 March 2011, GySgt Blenis described that the accused as being guarded since 1 March 2011. *See* Enclosure 24 at 6. GySgt Blenis attributed the change in communication and accused's more somber demeanor to the accused's receipt of the charge sheet and Article 138 response on 2 March 2011. *See id.* GySgt Blenis further noted that the accused stopped taking medication on 4 March 2011 and assessed the accused's behavior as being comparable to the accused's behavior in Kuwait. *See id.* GySgT Blenis communicated his concerns regarding the accused's demeanor to COL Malone. *See id.* at 5.

Around 25 March, the accused voluntarily removed eighteen people from his mail and visitation list, including his father. *See id.* at 6-7.

On 28 March 2011, the accused became upset after being escorted to an interview with his counselor. *See id.* at 4. During the interview, the accused "appeared extremely arrogant when asked about [brain teaser type puzzles]," stating that they were "below my level." *See id.* at 4. On 15 March 2011, COL Malone noted that the accused could benefit from intellectual stimulation of games, books, and magazines. *See id.* at 9. As of 16 November 2010, the Brig approved the accused's subscription to Scientific American. *See* Enclosure 22 at 44. The accused read and continued to receive the magazine. *See* Enclosure 24 at 9.

On 6 April 2011 and 15 April 2011, LTC Russell, who acted as the accused's psychiatrist in COL Malone's absence, recommended continuing POI. *See* Enclosure 21 at 31, 33. LTC Russell stated that the accused's emotional and behavioral presentation he observed varied significantly from that observed by the facility staff. *See id.* On 6 April 2011, LTC Russell wrote:

> Facility staff note increased social isolation, paucity of words during verbal interactions, poor eye contact, and reduced decorum. Facility staff state behavior is atypical of that observed by other inmates. Facility staff note [*sic*] possible correlation between receipt of additional charges, 706 proceedings and his changed behavior. History of severe adjustment disorder with suicidal thoughts. Due diligence for self harming behavior is not unreasonable given his change in behavior. Necessary reassurance of safety is difficult to achieve if SM chooses not to communicate with facility staff. I can not recommend changing his POI status given his behavioral change.

See id. at 31. On 15 April 2011, LTC Russell wrote:

> Plan: (1) Servicemember creating distance between himself and staff. Despite reasonable expectations SM can not comply to provide staff with reassurance of safety. Will likely find reasons which prevents [*sic*] him from complying. Will blame staff for his non compliance due to "unreasonable" perception of unreasonable demands. Will likely find other "unreasonable" demands despite [the Brig's efforts.] (2) Discussed with SM what he needs to do to comply. Replace responsibility on the SM. Recommendations: Continue with current plan and encourage compliance. Behavior will likely persist.

See id. at 33.

The United States disputes Defense Motion ¶ 50 as a summary.

v. Col Oltman did not issue an order to keep accused on POI indefinitely

The United States disputes Defense Motion ¶ 51. The United States stipulates that Col Oltman attended meetings with Brig staff.

The United States disputes Defense Motion ¶ 52. Col Oltman did not order the Brig personnel to keep the accused on POI indefinitely. *See* proffered testimony of Col Oltman. The Defense has provided no evidence of any order, but has merely argued that certain statements without context constitute an order. *See* Defense Motion ¶ 52.

Col Oltman communicated that the accused's long-term care consisted of a medical component and a security component, which affect classification decisions. *See* proffered testimony of Col Oltman. Col Oltman's comments reflected his concern that the accused not harm himself. *See id.*

The United States disputes Defense Motion ¶ 53. Col Oltman's comments reflected his concern that the accused not harm himself while in pretrial confinement. *See id.* The Brig held meetings to discuss the accused's status because his confinement received media attention. *See id.*

The United States disputes Defense Motion ¶ 54.

The United States stipulates that Defense Motion ¶ 55 reflects CAPT Hocter's impressions.

The United States disputes Defense Motion § I and ¶¶ 56-60 because they are irrelevant. The accused is charged with compromising hundreds of thousands of protected documents. *See* Charge Sheet. Therefore, the accused's conversations were and continue to be monitored to prevent him from compromising additional information. *See* Enclosure 9. Mr. Méndez informed the prosecution that he was willing to waive his request that a conversation with the accused not be monitored. *See* MAJ Fein at 17 July 2012 Article 39(a). The accused declined to meet Mr. Méndez and have the conversation monitored. None of the parties mentioned in Defense Motion ¶¶56-60 met with the accused nor had personal knowledge of the accused's confinement. The United States protected the accused's privacy and did not publicly release information regarding his mental health. *See* Defense Attachment 32 at 1-2.[11]

The United States stipulates to the contents of the entries in Defense Motion ¶ 56; however, not all of the signatories to Defense Attachment 28 are law professors or any kind of professor. *See, e.g.*, Defense Attachment 29 (noting Michael Bertrand as a signatory).[12] The United States stipulates to the contents of Defense ¶ 57-59. The United States stipulates to Defense Motion ¶ 60-61. The United States stipulates to the content of Defense Motion ¶ 62-66 but not the legal analysis of Mr. Coombs' emails. The accused refused to add Mr. Méndez or Congressman Kucinich to his authorized visitor list. The accused had visitation privileges. *See*

[11] The citation refers to the first two pages after the cover sheet of the Defense Attachment 32.

[12] The University of North Carolina's website describes Mr. Bertrand as a third year graduate student. *See* Chapel Hill Philosophy, available at http://philosophy.unc.edu/people/graduate-students/mike-bertrand [last visited 15 August 2012].

Enclosure 22 (documenting the accused's visitors); Enclosure 1 at 5 (authorizing visitors starting 2 August 2010).

The United States disputes Defense Motion ¶ 67. The United States stipulates that the Defense sent emails regarding the accused's confinement.

The United States disputes Defense Motion ¶¶ 68-69. The United States stipulates that Defense Motion ¶¶ 68-69 represent accurate transcriptions of the emails described.

The United States disputes the conclusions stated in Defense Motion ¶¶ 70-72.

The United States disputes Defense Motion ¶ 73. In particular, the United States disputes that the accused was in the equivalent of solitary confinement for almost eleven months.

The United States disputes Defense Motion ¶¶ 74-75. COL Coffman continued to address the accused's POI status. *See* Enclosure 43.

The United States stipulates to Defense Motion ¶ 76.

The United States disputes Defense Motion ¶ 77-78. The accused's complaints were considered in full in the final action on the accused's Article 138 complaint. *See* Enclosure 31. Assistant Secretary Garcia determined that the accused's claims lacked merit. *See id.*

vi. Conditions of Confinement

The Brig primarily housed pretrial detainees during the accused's confinement. *See* Brig SOP at 1 (referring to the Brig as a "pre-trial confinement facility). All detainees were confined in individual cells. *See* Enclosure 25 at 2. The number of detainees confined at the same time as the accused varied during his confinement, averaging approximately fifteen other detainees. *See* proffered testimony of MSgt Blenis. The accused was not the only detainee placed in MAX custody at the Brig during his confinement. *See id.*

The accused had phone privileges during his confinement. *See* Enclosure 22 (documenting the accused's phone calls); Enclosure 1 at 5 (authorizing phone privileges starting 2 August 2010). The Brig purchased a hands-free headset for the accused to use to place phone calls. *See* Enclosure 44. The accused had visitation privileges during his confinement.[13] *See* Enclosure 22 (documenting the accused's visitors); Enclosure 1 at 5 (authorizing visitation privileges starting 2 August 2010). The accused had television privileges during his confinement. *See* Enclosure 22 (documenting television call); Enclosure 1 at 5 (authorizing television privileges starting 2 August 2010). The accused had correspondence privileges during his confinement. *See* Enclosure 22 (documenting mail received and sent); Enclosure 1 at 5 (authorizing correspondence privileges starting 2 August 2010). The accused's correspondence time was increased from one hour to two hours at 27 October 2010. *See* Defense Motion ¶ 19(p).

[13] The United States has included the audio recordings from the accused's visits as Enclosure 49. The United States is in the process of obtaining transcripts of these recordings. The United States will produce the transcripts for the Court and Defense when they are completed.

The accused had library privileges. *See* Enclosure 22 (documenting books read by the accused); Enclosure 1 at 5 (authorizing library privileges starting 2 August 2010). Initially, the accused was permitted a single personal book. *See* Defense Motion ¶ 161(c). By 18 March 2011, the Brig had expanded the accused's access to books, permitting the accused 10-12 personal books and a subscription to Scientific American, a monthly magazine. *See* Enclosure 24 at 9.

The accused received sunshine call and later recreation call during his confinement. *See* Enclosure 22; Enclosure 1 at 6, 15. Initially, the accused received 20 minutes of sunshine call as his recreation call. *See* Enclosure 22 at 1-50; Enclosure 1 at 6. The accused did not have sunshine calls on cold days before 10 December 2010. *See* proffered testimony of Brig staff. The Brig increased accused's recreation call to one hour on 10 December 2010 based on the Brig commanding officer's assessment of the accused behavior. *See* proffered testimony of CWO4 Averhart; Enclosure 1 at 15. The accused was authorized to speak to occupants of other cells in a low conversational tone. *See* Enclosure 1 at 5 (authorizing speaking in a low conversational tone starting 2 August 2010).

The accused was free to use the provided exercise equipment during recreation call but chose to walk almost always in a figure-eight pattern. *See* proffered testimony of Brig staff.

The accused's cell had natural light from a skylight immediately outside his cell, and from the wall of windows at the end of the hallway, which contained approximately eight cells. *See id.* The light from the skylight and window brightened the hallway and cells so that no artificial light is needed to move throughout the area during daylight hours. *See id.*

The Brig did not permit any detainee to sleep during work hours to ensure good order and discipline. *See* proffered testimony of CWO4 Averhart; CWO5 Galaviz.

The United States stipulates that Defense Motion ¶ 14 is an accurate reproduction of the cited section of SECNAVINST 1640.9C. The United States stipulates that CWO4 Averhart, the Brig commanding officer, added the listed characteristics. The characteristics quoted by the Defense Motion are required for Suicide Risks. *See* SECNAVINST 1640.9C Art. 4205(5) at 4-14.

The United States stipulates that Defense Motion ¶ 15 describes the restrictions for Medium Custody In.[14] During the accused's confinement at the Brig, no detainees were assigned to dormitory quarters. *See* Enclosure 25 at 2.

The United States stipulates to Defense Motion ¶ 16.

The United States disputes Defense Motion ¶ 17. The accused was placed in special quarters because he was at risk for self harm. *See* Enclosure 29 at 2. All detainees were housed in the same area of the Brig. *See* Enclosure 25 at 2.

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[14] "Medium" custody does not exist as a classification within SECNAVINST 1640.9C. Instead, SECNAVINST 1640.9C establishes a custody classification scheme that includes, MAX, Medium Custody In, Medium Custody Out, Minimum Custody, and Installation Custody. *See generally* SECNAVINST 1640.9C Art. 4202(2) at 4-7 to 4-9.

The United States disputes Defense Motion ¶ 18. The United States stipulates to Defense Motion ¶ 18(j), (l). The accused's conversations were monitored due to ongoing national security concerns. *See* Enclosure 9. MAX detainees are not permitted work duty outside the cell. *See* Enclosure 29 at 2. All detainees at the Brig were prohibited from sleeping during work hours. *See* proffered testimony of MSgt Blenis.

The United States disputes Defense Motion ¶ 19. The United States stipulates to Defense Motion ¶ 19(a), (b), (d), (k), and (p). The light outside the accused's cell was described as dim. *See* Enclosure 25 at 4. The dim light was an emergency light that could not be turned off. *See* proffered testimony of Brig staff. The United States stipulates that the accused was provided a safety mattress for prevention of suicide. The United States stipulates that the accused was provided a tear-proof security blanket for prevention of suicide. The accused's personal items were stored in a cell adjacent to the accused's cell; the Brig stored personal items for detainees in adjacent cells based on security concerns. *See* proffered testimony of GySgt Fuller, CWO5 Galaviz. Paper and exercise in the cell posed a potential risk and was limited and restricted accordingly; a detainee could force himself to choke on paper or injure himself performing calisthenics in the cell. *See* proffered testimony of CWO5 Galaviz. There is no evidence the accused was diagnosed with a rash or told a medical provider that he had a rash.

The accused did not assault any staff or detainees at the Brig. *See* proffered testimony of Brig staff.

D. JRCF

The United States stipulates to Defense Motion ¶ 79.

During the accused's confinement at the JRCF, his command continued to send representatives to visit him. *See* Enclosure 26 at 82-86. The accused continued to say that he received good treatment from the guards, understood the grievance process, and had not had to use the grievance process. *See id.*

On 10 December 2011, the accused attacked another detainee. *See* Enclosure 45 at 12. The accused struck the other detainee repeatedly with a closed fist. *See id.* The accused initiated the assault without physical provocation. *See* Enclosure 46 at 9:35-9:45. The accused stated, "I'm not good at defending myself. I'm just saying it's not as much of what I supposed to have done, but more of a failure to what somebody supposed to have done." *See* Enclosure 45 at 3.

The accused was found guilty of assault consummated by battery and disorderly conduct by the JRCF Discipline and Adjustment Board. *Id.* at 2. The Discipline and Adjustment Board recommended 15 days segregation and 14 days extra duty. *See id.* The Defense did not contest these restrictions on the accused's confinement.

LEGAL AUTHORITY AND ARGUMENT

Article 13, UCMJ, sets forth two general prohibitions: 1) imposition of punishment prior to trial, and 2) conditions of arrest or pretrial confinement that are unduly rigorous. *See United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). Navy regulations grant confining authorities and, in particular, commanding officers of confinement facilities, discretion to set the conditions of a detainee's confinement.[15] Accordingly, the confining authorities at the Brig made reasonable, individualized determinations about the accused's status and classification based on legitimate government interests, to include ensuring the accused's safety, protecting national security, maintaining good order and discipline at the confining facility, and ensuring the accused's presence at trial. The restrictions were not unduly rigorous because they were related to legitimate government interests. Moreover, conditions similar to those experienced by the accused have been held lawful. The Defense contends that the Brig acted arbitrarily or with an intent to punish because the Brig did not follow every recommendation of the accused's psychiatrist. However, the Defense theory contradicts the regulatory command structure at the Brig. Under Navy Instructions, the psychiatrist lacks authority to make the ultimate decisions of a detainee's confinement because the psychiatrist is an adviser to the Brig commander; however, the psychiatrist's determination that a detainee should be removed from SR is binding under Navy Instructions. Therefore, the accused's confinement only violated Article 13 by failing to remove the accused from SR after the psychiatrists' recommendations on 6 August 2010 and 18 January 2011. Thus, the accused is entitled to **no more than seven days of confinement credit**. *See* Section II(C)-(D), *infra.*

I. ARTICLE 13, UNIFORM CODE OF MILITARY JUSTICE

The first prohibition involves a purpose or intent to punish, which is determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are "reasonably related to a legitimate governmental objective." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997) (stating imposition of punishment or penalty prior to trial entails purpose or intent to punish an accused before guilt or innocence has been determined). Conditions and restrictions that are arbitrary or purposeless may also raise an inference of punishment. *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989). For Article 13, questions of purpose and intent are questions of fact. *See id.* at 165 (citing § 2.02, ALI Model Penal Code, reprinted in ALI *Model Penal Code and Commentaries* (Part 1) 225-53 (1985)).

Additionally, courts consider whether the accused complained or was singled out by detention officials. *See James*, 28 M.J. at 216. Placing the accused under the same limitations as all persons confined at the facility does not demonstrate an intent to punish. *Id.* Similarly, violations of regulations by government officials concerning pretrial confinement do not constitute punishment *per se*. *See United States v. Williams*, 68 M.J. 252, 253 (C.A.A.F. 2010). Importantly, correctional facility commanders, not prisoners, should determine the conditions of

[15] The Brig at MCBQ was a Navy facility. Accordingly, it was subject to U.S. Department of Navy Instruction 1640.9C (SECNAVINST 1640.9C) (3 January 2006) [hereinafter Navy Instructions]. This Response will refer to SECNAVINST 1640.9C as "Navy Instructions" and cite to SECNAVINST 1640.9C. The Brig at MCBQ had a set of standard operating procedures based on SECNAVINST 1640.9C. *See* Quantico Base PCF Order 1640.1C, Marine Corps Base Quantico Pre-Trial Confinement Facility Standard Operating Procedures (Brig SOP) (1 July 2010). The United States enclosed SECNAVINST 1640.9C as Enclosure 47 and the Brig SOP as Enclosure 48.

confinement. *United States v. Palmiter*, 20 M.J. 90, 96 (C.M.A. 1985). "Under no circumstance should the prisoner be the one to dictate the terms and conditions of his confinement." *Id.* at 96 (emphasis in original). "This should always be left up to the correctional facility commanders and the respective services." *Id.*

The second prohibition precludes imposing unduly rigorous conditions during pretrial detention. *See United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011). Conditions that are sufficiently egregious or excessive may constitute punishment. *McCarthy*, 47 M.J. at 165 (citing *Thompson v. Keohane*, 516 U.S. 99, 109-13 (1995)). As with determinations regarding an intent to punish, conditions related to legitimate government interests are not more rigorous than necessary. *See McCarthy*, 47 M.J. at 167 (stating that ensuring safety and presence at trial are legitimate governmental interests). In reviewing the conditions, courts defer to the decisions of confinement authorities in light of the information available at the time of decision. *See id.* at 167-68 (stating that subsequent good behavior does not justify revising the facts at the time of the decision by the brig authority).

Conditions of confinement that violate service regulations do not create a *per se* right to sentencing credit. *Williams*, 68 M.J. at 253. However, brig officials who abuse their discretion by violating applicable service regulations may violate Article 13, thereby allowing a servicemember to request confinement credit under RCM 305(k). *See id.* RCM 305(k) is the principal remedy for Article 13 violations; however, courts may consider other relief where context warrants. *See Zarbatany*, 70 M.J. at 175. Violations of Article 13 require meaningful relief be granted to the accused, but the relief given must not be disproportionate in the context of the case, including the harm suffered by the accused and the seriousness of his offenses. *See id.* at 178.

II. NAVY INSTRUCTIONS VEST BRIG COMMANDING OFFICER WITH AUTHORITY TO DETERMINE CONDITIONS OF ACCUSED'S CONFINEMENT

SECNAVINST 1640.9C (Navy Instructions) and the Brig SOP vest decision-making authority in the Brig commanding officer for determining MAX custody and POI status. Both the Navy Instructions and the Brig SOP define the advisory roles of both the C&A Board and medical officers. Furthermore, Navy Instructions and the Brig SOP define all exceptions to the general rule that the Brig commanding officer retains decision making authority, thereby limiting staff decision-making authority only to situations defined by the regulations. *See* SECNAVINST 1640.9C Art. 4205(5)(d) at 4-16; SECNAVINST 1640.9C Art. 7205(4)(c)(5) at 7-21; Brig SOP Art. 6005(1)(g)(21)(c)(5) at 104; *compare* SECNAVINST 1640.9C Art. 3201 at 3-8 (stating that the Brig commanding officer has overall responsibility for the confinement facility), *and* Brig SOP Art. 1002(1)(a) at 10 (stating that the Brig commanding officer has immediate command responsibility for all phases of the Brig's operation) *with* SECNAVINST 1640.9C Art. 10101 at 10-1 (stating that the medical officer advises the Brig commanding officers in matters pertaining to the well-being of detainees), *and* Brig SOP Art. 1002(1)(c) at 10 (stating that the medical officer shall be responsible to the Brig commanding officer).

Courts defer to confinement officials and review their actions for abuse of discretion. *See United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007). By necessity, Navy Instructions vest

discretion in Brig commanding officers to make classification decisions based on the facts known at that time.. *See McCarthy*, 47 M.J. at 168-69 (interpreting SECNAVINST 1640.9A, a prior version of SECNAVINST 1640.9C). Courts review this discretion for an abuse that manifests into a restriction that is arbitrary or unrelated to a legitimate governmental objective. *See Williams*, 68 M.J. at 257 n. 8.

Moreover, a detainee cannot dictate the terms of his confinement because his confinement is within the discretion of the confinement authorities. *See McCarthy*, 47 M.J. at 168. The detainee cannot question the discretion of the confinement authorities by arguing that a less restrictive confinement would have necessarily achieved the same governmental objectives. *See id.* (citing *Palmiter*, 20 M.J. at 90) ("Appellant complained throughout his confinement of his conditions, either personally or through counsel, and has argued that the lesser status of medium custody would have ensured his presence at trial. However, a prisoner is not permitted to dictate the terms and conditions of his confinement. Such terms are within the discretion of the confining authorities."). Here, the Brig commanding officers did not abuse their discretion by determining that the accused should remain in MAX custody and POI based on factors listed in the Navy Instructions and facts known to them at the time of making the decisions.

A. Initial Classification and Assignment Proper

The Brig legally and properly placed the accused on MAX custody and SR after his indoctrination. The Defense concedes that the accused's initial classification was legitimate. *See* Defense Motion ¶ 217 n. 26; ¶ 227.

MAX custody is appropriate for prisoners requiring special custodial supervision. *See* SECNAVINST 1640.9C Art. 4201(2)(a) at 4-7. A decision to assign a detainee MAX custody may be based on, *inter alia*, assaultive behavior, disruptive behavior, serious military criminal record (convicted or alleged), low tolerance of frustration, poor home conditions or family relationships, a mental evaluation indicating serious neurosis or psychosis, and potential length of sentence. *See* SECNAVINST 1640.9C Art. 4202(5) at 4-10. The accused received MAX custody because the DBS overrode the points total based on the accused's meeting all administrative factors listed on DD Form 2711 and the accused's suicide watch status at the TFCF. *See* Enclosure 19 at 1. The DBS, who makes the initial custody classification decision, possessed the authority to override the initial point score. *See* Enclosure 19 at 1 (containing pre-typed space dedicated to noting and explaining overriding decisions); *cf.* (Brig SOP Art. 6004(5)(c)(5) at 100 (granting the Brig commanding officer authority to override decision of C&A Board). The accused had a record of assaulting a fellow Soldier, poor home conditions and family relationships, mental health evaluations indicating the accused was a threat to himself, and faced a potentially long sentence. Accordingly, where the accused wrote that he was "always planning, never acting" about considering suicide, the DBS properly and within his authority assigned the accused MAX custody based on the accused's prior history of suicide watch, which was based on previous psychiatric evaluations, and acts by the accused, including constructing at least one noose. *See* Enclosure 20 at 5; Enclosure 19 at 1. Subsequent acts by the accused do not revise the facts as they existed and were known to the Brig authorities at the time of classification. *See McCarthy*, 47 M.J. at 168.

The accused's initial SR determination was also proper. Detainees who have attempted or considered committing suicide may be placed in the SR category. *See* SECNAVINST 1640.9c Art. 4205(5)(b) at 4-15. Given the information known to the Brig staff when the accused arrived, placing the accused on SR was the only prudent action. CAPT Hocter's recommendation shortly thereafter to place the accused on SR also supports the decision to place the accused on SR upon his arrival.

B. Decision to Maintain MAX Proper

Custody classification establishes the degree of supervision needed for control of the detainee. *See* SECNAVINST 1640.9C Art. 4201(1) at 4-6. The Navy Instructions recognize that detainees present wide variations in personality and mentality and grant authority to shape custody appropriately. *See* SECNAVINST 1640.9C Art. 4201(1) at 4-6; SECNAVINST 1640.9C Art. 4201(2)(a)(6) at 4-7 (granting CO/OIC/CPOIC the authority to approve additional restraint for movement of specific MAX detainees on a case-by-case basis). The Brig SOP acknowledges certain detainees will require additional supervision based on personality disorders, risk of violence, or other character traits. *See* Brig SOP Art. 6004(5)(c)(13) at 102. In particular, detainees who pose a risk to life, property, or national security should be placed in MAX custody. *See* SECNAVINST 1640.9C Art. 4202(2)(a) at 4-7; Defense Motion ¶ 27.

The C&A Board continues to review a detainee's custody classification using objective reclassification procedures. *See* SECNAVINST 1640.9C Art. 4204 at 4-13; Brig SOP Art. 6004(5)(c)(10) at 100. The Brig commanding officer, however, ultimately decides a detainee's custody classification; the Brig commanding officer considers but is not bound by the findings of the C&A Board. *See* Brig SOP Art. 6004(5)(c)(5) at 100 (noting that the Brig commanding officer determines whether the C&A Board's recommendation on reclassification should be overridden). To make a custody determination, the Brig commanding officer considers objective factors and does not rely solely on the classification factors, which are merely indicators. *See* SECNAVINST 1640.9C Art. 4202(7) at 4-11 to 4-12 ("It must be understood the [classification factors] are only indicators, not ironclad rules; therefore, the CO/OIC/CPOIC shall consider objective based overrides where applicable. An evaluation of all phases of the prisoner's performance shall be made prior to each custody change."). Therefore, the regulations grant wide authority and discretion in the Brig commanding officer to make custody determinations.

In the instant case, the C&A Board reviewed the accused's custody classification every week and made a recommendation each week to keep the accused in MAX custody. *See* Enclosure 32. The C&A Board consistently noted the accused's poor home conditions or family relationship, the potential length of sentence, and the accused's previously demonstrated suicidal ideations and gestures in assessing the accused as requiring a MAX custody assignment. *See, e.g.*, Enclosure 32 at 2. Additionally, the C&A Board noted erratic behavior on 28 December 2010 and 18 January 2011 where the accused stated that the elastic band in his underwear was dangerous. *See* Enclosure 32 at 2, 6. The accused also went before the Board and claimed that his prior statement about suicide that he was "always planning, never acting" may have been false and was made sarcastically. *See* Enclosure 24 at 20; Enclosure 32 at 10. Given the accused's statements, the Brig authorities could not reasonably rely on the accused's self-reporting that he was not at risk of self harm. Based on these factors, among others, the C&A

Board consistently recommended the accused be assigned MAX custody. *See, e.g.*, Enclosure 32 at 10. No evidence has been presented that any Board member colluded, predetermined, or was ordered to make their recommendation to support the Defense's speculation. The accused, having been charged with compromising hundreds of thousands of protected documents, presented a threat to national security. In turn, the Brig commanding officers accepted the recommendation and determined that the accused should remain in MAX custody for the following week.

C. First SR Status

On 6 August 2010, CAPT Hocter recommended downgrading the accused's status from SR to POI. Navy Instructions state that "[w]hen prisoners are no longer considered to be suicide risks by a medical officer, they shall be returned to appropriate quarters." SECNAVINST 1640.9c Art. 4205(5)(d) at 4-16. On 11 August 2010, the accused was moved from SR to POI. Although the Navy Instructions do not specify a deadline by which a detainee must be moved from SR to a lower status, the United States concedes that the change should have been made before 11 August 2010. *See Williams*, 68 M.J. at 254.

In *Williams*, the detainee was placed in MAX custody and in a suicide watch cell on suicide watch under conditions that paralleled those of the accused. *See United States v. Williams*, 2007 WL 4461204 (A.F. Ct. Crim. App. 2007) at *6 (describing the conditions of confinement as determined in the lower court's findings of fact); *see also United States v. Willenbring*, 56 M.J. 671, 678-79 (A. Ct. Crim. App. 2001). The cell measured approximately 5'10" by 8' and was lighted 24 hours a day until a night light was installed in the cell approximately 174 days into the accused's confinement. *See Williams*, 2007 WL 4461204 at *6. (stating that the night light was installed approximately two weeks before trial, which concluded 188 days after the accused was placed on suicide watch). The detainee wore a suicide gown while on suicide watch. *Id.* Also, the detainee lacked many personal items, including a radio and CD player. *See Williams*, 68 M.J. at 257. Additionally, the detainee in *Williams* endured conditions more strict than the accused in the instant case. The detainee's cell was monitored by a camera. *Id.* The cell contained a bed that measured 5'10", and the detainee was approximately 6'3" tall. *Id.*

The conditions did not violate Article 13; however, the confinement facility's failure to provide the accused with a psychiatric evaluation every 24 hours, as required by Air Force regulations, violated Article 13. *See id.* at 258 (awarding additional 86 days of confinement credit and deciding that the conditions of confinement served a legitimate, nonpunitive governmental interest). The confinement facility had also violated Article 13 by failing to comply with an Air Force regulation requiring removal of a detainee from suicide watch upon recommendation of a psychiatrist. *See id.* (upholding lower court's ruling that the violation of the Air Force regulation entitled the accused to confinement credit). The accused was only awarded one-for-one credit despite the six month duration of the violation. *See id.* The Court of Appeals for the Armed Forces (CAAF) upheld the one-for-one credit because the restrictions of the confinement were related to the accused's suicide watch status. *See id.*

The 6 August 2011 psychiatric evaluation supports concerns that the accused was at risk of self harm because the psychiatrist assessed the accused as being a substantial risk and a threat to himself. *See* Enclosure 21 at 2. Moreover, the conditions of SR were directly related to preventing the accused from engaging in self harm, which serves the legitimate, nonpunitive governmental interest of ensuring the accused's safety. There is no evidence of any intent to punish the accused in this case at any time, and Brig officials were concerned with protecting the accused. Thus, the credit should be no more than one-for-one in accordance with *Williams*, which decided a remedy for two Article 13 violations. **Accordingly, the United States stipulates that the accused should receive credit of no more than five days for his being on SR from 6 August 2010 until 11 August 2010**. *See Williams*, 68 M.J. at 258 (granting a total of 274 days confinement credit, which excluded the final day, for failure to remove accused from suicide watch from 31 May 2004 until 2 March 2005). The accused's credit should be calculated based on the following days: 6, 7, 8, 9, and 10 August 2010. *See id.*

D. Second SR Status

Detainees who have threatened suicide or have made a suicidal gesture may be placed on SR. *See* SECNAVINST 1640.9C Art. 4205(5)(b) at 4-15. The detainee's clothing may be removed when necessary. *See* SECNAVINST 1640.9C Art. 4205(5)(b) at 4-16. Navy Instructions do not require pre-approval to place a detainee on SR; however, Navy Instructions explicitly require a detainee to be removed once a medical officer determines SR is no longer necessary. *See* SECNAVINST 1640.9C Art. 4205(5)(d) at 4-16. Because the Navy Instructions do not require pre-approval, CWO4 Averhart's decision to place the accused on SR on 18 January 2011 was proper. According to the CWO4 Averhart and MSgt Papakie, the accused displayed troubling behavior, including striking himself in the head, frustration, and stuttering in CWO4 Averhart's presence. Additionally, the accused had just suffered an apparent anxiety attack that caused him to fall. Given the information available, CWO4 Averhart's decision to place the accused on SR was proper.

However, a medical officer recommended placing the accused on POI, not SR, that day in response to the accused's anxiety attack. Accordingly, the United States stipulates that the accused should have been removed from SR. The accused was removed from SR and placed on POI on 20 January 2011. **Accordingly, the United States stipulates that the accused should receive credit of no more than two days for his being on SR from 18 January 2011 until 20 January 2011**. *See Williams, supra.* The accused's credit should be calculated based on the following days: 18 and 19 January 2011. *See id.* The 18 January 2011 psychiatric evaluation supports CWO4 Averhart's concerns because the psychiatrist assessed the accused as requiring further mental evaluation and having a low tolerance of frustration. *See* Enclosure 21 at 22. Furthermore, the conditions served a legitimate, nonpunitive governmental interest of maintaining the accused's safety. *See id.* Thus, the credit should be one-for-one. *See Williams, supra.*

E. Decision to Place Accused on POI Also Proper

Similarly, the initial determination to place the accused on POI was proper because the C&A Board and CAPT Hocter all recommended to the Brig commanding officer, CWO4

Averhart that the accused should be placed on POI. CWO4 Averhart noted the agreement while documenting the decision to place the accused on POI.[16]

F. Decision to Maintain POI Proper

The C&A Board examines the need for continuation of SR or POI. *See* Brig SOP Art. 6004(5)(c)(11) at 101; Brig SOP Art. 6004(1)(a) at 97 (stating that the purpose of custody classification is to establish the degree of supervision needed for control of individual detainees; *see also* Brig SOP Art. 6004(1)(c) at 97 (noting that a detainee's classification may be reviewed more frequently if desired or necessary); Brig SOP Art. 6004(5) at 99 (stating conditions that may effect a reclassification) at 99. No instruction requires the C&A Board to document its findings. *See* SECNAVINST 1640.9C Art. 4204 at 4-13, Art. 6303 at 6-6 to 6-7; *see also McCarthy*, 47 M.J. at 166 (finding no Article 13 violation where regulations recommended C&A Board meet weekly but did not require the Board to meet weekly). The C&A Board considers, *inter alia*, the detainee's: combative or disruptive behavior; mental evaluations; low tolerance of frustration and stress; seriousness of the offense; clear military record, aside from present offense; home conditions and family relationships; pattern of poor judgment; behavior during a previous confinement; and behavior in current confinement. *See* Brig SOP Art. 6004(5)(c)(4) at 99-100.[17] The C&A Board, based on a wide range of factors, makes a recommendation to the Brig commanding officer. *See* Brig SOP Art. 6004(5)(c)(11) at 101 (describing process of C&A Board making a recommendation to the Brig commanding officer for approval). Ultimately, as the authority responsible for the Brig, the Brig commanding officer decides the appropriate classification of detainees, including the accused. *See* SECNAVINST 1640.9C Art. 3201, Art. 3201(b) at 3-8.

The commanding officer of the Brig has "overall responsibility for operation of the confinement facility." SECNAVINST 1640.9C Art. 3201 at 3-8. Brig SOP further delineates the command structure, defining a medical officer as "assigned in writing by the Naval Health Clinic, Quantico, and shall be responsible" to the Brig commanding officer for the health and medical care of prisoners. Brig SOP Art. 1002(1)(c) at 10. Specifically, the medical officer advises the Brig commanding officer in matters pertaining to the well-being of detainees. *See* SECNAVINST 1640.9C Art. 10101 at 10-1. Navy Instructions and the Brig SOP vest final authority for decisions of classification in the Brig commanding officer, not the medical officer. *See* SECNAVINST 1640.9C Art. 3201, Art. 3201(b) at 3-8; Brig SOP Art. 6004(5)(c)(5) at 100. Moreover, Navy Instructions and the Brig SOP explicitly give the medical officer complete authority for specific decisions related to medical expertise, to include removal from SR or

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[16] The United States stipulates *supra* that the accused should have been removed from SR and placed on POI on 6 August 2010.

[17] The Brig SOP offers a non-exhaustive list: combative/disruptive behavior; serious alcohol/drug abuse; mental evaluations; indications that the individual wishes to return to duty; serious civil/military criminal record; low tolerance of frustration/stress; intensive acting out or dislike of the military; clear military record, aside from present offense; seriousness of offense; home conditions/family relationships; unwillingness/willingness to accept responsibility; pattern of poor judgment; pending civil charges; behavior during a previous confinement; participation in self-help/education programs; behavior in confinement; length of time since last negative report; and work and training report evaluations. Brig SOP Art. 6004(5)(c)(4) at 99-100.

quarantine. *See* SECNAVINST 1640.9C Art. 4205(5)(d) at 4-16; SECNAVINST 1640.9C Art. 7205(4)(c)(5) at 7-21; Brig SOP Art. 6005(1)(g)(21)(c)(5) at 104 (granting medical officers authority to quarantine detainees who refuse clinically indicated diagnostic procedures and evaluations for infectious and communicable diseases).

As discussed *supra*, the C&A Board evaluated the accused each week, noting his erratic behavior and frequently determining that he had a low tolerance for frustration. The C&A Board also noted the accused told the Board that the accused had been sarcastic when he previously wrote that he was "always planning, never acting" about suicide, a statement he told the Board he made that may have been false. The factors cited changed based on the accused's actions each week and reflected an individualized determination based on then current information. In particular, the C&A Board considered the accused's behavior during confinement; the accused was not singled out. *See* proffered testimony of CWO4 Averhart, MSgt Blenis. Based on those factors, the C&A Board recommended maintaining POI status for the accused. Although unusual, the Board noted that the accused was not the only detainee to be placed on POI for an extended period of time. *See* Enclosure 24 at 20. In fact, all subsequent decisions to maintain POI status made by the Brig commanding officer were supported by unanimous decisions of the C&A Board to maintain POI status.

Accordingly, the Brig commanding officer determined each week that the accused should remain in POI. The Brig commanding officer also adjusted the accused privileges based on an individualized review of the accused's behavior in confinement. *See, e.g.*, Enclosure 1 (increasing recreation call from twenty minutes to one hour). Given the vested authority in the Brig commanding officer and the supplementary determinations of the C&A Board, POI status was properly approved for every week the accused remained in confinement.

G. Morning Inspections Following 2 March 2011

The Brig commanding officer possessed the authority to order the removal of the accused's clothing. *See* SECNAVINST 1640.9C Art. 4205(5)(b) at 4-16. Additionally, CWO2 Barnes, as the Brig commanding officer, possessed a reasonable basis to remove the accused's clothing after the accused stated that his clothing was dangerous because it could be used for self harm by choking. Accordingly, CWO2 Barnes had ordered that the accused surrender his clothing at night. After the accused discussed the threat posed by the elastic waistband in his underwear, CWO2 Barnes updated the accused's handling instructions to require that the accused surrender his clothing, including his underwear, at night.

The Defense cites a newspaper's interpretation, not quotation, of 1stLt Villiard's statement alleging that the accused would be required to stand naked outside his cell during morning inspection. *See* Defense Motion ¶ 126. 1stLt Villiard was a Marine spokesman. The statement attributed to 1stLt Villiard is mistaken. The accused was not required to stand naked at attention and did not stand naked at attention any morning.

On 3 March 2011, the accused chose to stand naked at parade rest during morning inspections. Neither the guards nor the Brig commanding officer ordered or required the accused to stand naked at attention or parade rest. In fact, the Brig staff counseled the accused

that he should cover himself and was not required to stand at all, let alone naked and at attention. The Brig staff returned the accused's gear and provided him time to change before morning count. The accused stood at parade rest without covering himself with his blanket of his own volition on a single day. Because the accused chose to stand naked at parade rest, Brig officials did not violate Article 13 rights.[18]

[18] The cases cited by Defense Motion ¶ 130 grant no more than one-for-one credit. Thus, assuming, *arguendo*, that the accused is entitled to a credit, the credit should be no more than one-for-one because the violation was brief and part of an otherwise lawful restriction.

III. LACK OF INTENT TO PUNISH

A. No Intent to Punish

An intent or purpose to punish constitutes an Article 13 violation. *See Adcock*, 65 M.J. at 22. Courts find an intent to punish either by: 1) determining the confinement officials possessed an intent to punish, or 2) deciding the purposes of the restriction are not reasonably related to a legitimate governmental objective. *See id.* (citing *King*, 61 M.J. at 227). The issue "of intent to punish is 'one significant factor in [the] judicial calculus' for determining whether there has been an Article 13 violation." *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (citing *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994)) (noting that the CAAF will not overturn a lower court's finding of fact unless the finding is clearly erroneous).

There is no evidence that any individual at MCBQ possessed any intent to punish the accused. Indeed, all actors at MCBQ prioritized the safety of the accused and made decisions accordingly. The Defense fails to cite any evidence demonstrating an evil intent. Instead, the Defense repeatedly cites statements demonstrating the understanding that the regulations vest authority and discretion in the Brig commanding officer to make determinations regarding the accused's custody and status. *See, e.g.*, Defense Motion ¶ 141 (quoting MSgt Papakie but failing to note his explanation of exercising caution, which stated, "Things that you've said and things that you've done . . . [t]hey make us stay on the side of caution. . . . That's all [the brig psychiatrist] is . . . a recommendation. We have, by law, rules and regulation set forth to make sure from a jail standpoint that Bradley Manning does not hurt himself."); *id.* ¶ 167 n. 17 (quoting CWO4 Averhart as saying "I have not imposed any disciplinary segregation, but these incidents do cause me continuing concern regarding [the accused's] safety and intentions," but failing to note the CWO4 Averhart was discussing the violations as one of many factors on which he based his decision). Additionally, the Defense construes memories of Col Oltman's alleged statements as an order when they reflect an understanding of the process of ongoing review. *See* Defense Motion ¶ 52 (concluding that Col Oltman that ordered the accused to be placed on POI indefinitely and not that Col Oltman's comments reflect an understanding that the medical officers present recommendations). The Defense mistakenly characterizes actions intended to keep the accused safe as an intent to punish. *See, e.g.*, Defense Motion ¶¶ 84-85, 91, 106, 124, 135, 200. Accordingly, the Defense fails to demonstrate an intent to punish because such intent never existed.

B. Conditions of the Accused's Confinement Not Arbitrary

A restriction permits an inference that it is punishment if the restriction is arbitrary or purposeless, and therefore is not reasonably related to a legitimate governmental objective. *See McCarthy*, 47 M.J. at 167 (citing *James*, 28 M.J. at 216). However, "a failure to follow regulations does not justify the conclusion that confinement was a form of punishment or penalty" because violations of service regulations do not require awarding credit *per se*. *See McCarthy*, 47 M.J. at 166 (citing *United States v. Moore*, 32 M.J. 56, 60 (C.M.A. 1991)); *Adcock*, 65 M.J. at 23. The lack of a *per se* right to credit reflects "the long-standing principle that not all violations of law result in individually enforceable remedies." *See Adcock*, 65 M.J. at 23 (citing *United States v. Green*, 14 M.J. 461, 464 (C.M.A. 1983); *United States v. Whitting*, 12

M.J. 253, 255 (C.M.A. 1992)). However, a government agency must abide by regulations designed to protect personal liberties. *See id.* (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980); *but see King*, 61 M.J. at 228 (stating that departing from requirements of confinement regulation despite the accused's apparent good behavior in confinement does not require awarding confinement credit *per se*).

There were no arbitrary decisions made with respect to the accused. Col Oltman did not issue an order that the accused would remain in any status indefinitely, nor was the result of the process predetermined as the Defense alleges. The Defense simply disagrees with the determinations made by the confinement authorities, but disagreement with the result does not create an Article 13 violation. *See McCarthy*, 47 M.J. at 168 (deciding that the Defense theory that less restrictive form of confinement was without merit). Moreover, the commanding officers of the Brig, as the commanders, were responsible for the accused's safety; the Defense questions the decisions that kept the accused safe with the benefit of hindsight.

As discussed *supra*, the C&A Board and Brig commanding officer considered a variety of factors in deciding the accused's classification, including, *inter alia*, the accused's erratic behavior; his mental anxiety disorder, which was diagnosed as only in remission; his tolerance of frustration; his interaction with the Brig staff; his poor home conditions and family relationships; disruptive behavior; the threat he posed to national security having been charged with compromising hundreds of thousands of protected documents; his having constructed at least one noose; his statement that he was "always planning, never acting" about suicidal thoughts; his statement that he may have made a false statement about suicide when he said he was "always planning, never acting;" and the potential length of sentence the accused faced.[19] These factors support finding the classification decisions of the Brig commanding officers and C&A Board to be reasonable. Preferring its own judgments based on the self-interest *ex post* statements of the accused over those of the confining authorities, the Defense theory contradicts the regulations and military law.

In particular, the Defense questions the decisions to continue placing the accused in POI because the Brig psychiatrist recommended removing the accused from POI.[20] However, the Defense's theory that the more conservative conclusions reached by the Brig confining authorities were improper fails because the Navy Instructions vest the authority in the Brig commanding officers and not the mental health providers. *See, e.g.*, SECNAVINST 1640.9C Arts. 3201, 3201(b), 4202(7), 4205(5)(b), 4205(5)(d); Brig SOP Art. 1002(1)(a) at 10; Brig SOP Art. 6004(5)(c)(5) at 100. The Defense notes that the Brig commanding officer elected to exercise discretionary authority and not follow recommendations from the medical officers for other detainees; the practice was not unique to the accused. *See* Defense Motion ¶ 21 ("[The Brig] generally keep[s] patients on precautions longer than I recommend."). Under the theory presented by the Defense, recommendations by medical officers, defined by the regulations as advisers to the Brig commanding officer, should be automatically binding on the Brig commanding officer despite the authority and discretion specifically vested by the regulations.

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[19] These factors were not considered simultaneously but varied depending on changing circumstances.

[20] CAPT Hocter initially served as the accused's mental health care provider. During this period, COL Malone was CAPT Hocter's consultant. After CAPT Hocter departed, COL Malone replaced CAPT Hocter.

See SECNAVINST 1640.9C *supra*. Accordingly, the Defense theory directly contradicts the authority of confining authorities as noted in case law and detention regulations.

Moreover, after the pretrial detainee suicide in January 2010 at the Brig, the confining authorities chose to exercise caution and prudence. The exercise was not arbitrary. The accused has a history of anxiety attacks, which correlate with suicidal ideations and comments. *See* ¶¶ 16-17 (fashioning at least one noose after an anxiety attack); ¶¶ 85-86 (stating that the elastic waistband in his underwear was dangerous after receiving the additional charges). The exercise of caution was prudent where the accused had called the truthfulness of his prior statements about his suicidal ideations into question. The accused had told mental health providers that he was "patient" and had claimed he wasn't suicidal for the purpose of being removed from suicide watch restrictions in Kuwait. The accused also lacked rapport with the confining authorities because he was withdrawn. *See* Enclosure 24 at 6 (describing the accused as guarded and somber after receiving the additional charges and Article 138 response). In fact, the accused had experienced similar withdrawal and communication issues with providers prior to his being charged with compromising information. *See, e.g.*, Enclosure 3 at 85, 90.

In April 2011, a new mental health care provider, LTC Russell, reached different conclusions from his peers, determining that the accused sought reasons to justify his noncompliance and failed to communicate with the Brig staff, thereby making their mission to keep the accused safe more difficult. *See* Enclosure 21 at 33 (stating that the accused refused to comply with reasonable expectations to assure the staff of his safety, the need to place responsibility on the accused, and the likelihood that the accused's behavior would likely continue). The Brig staff based its decisions, in part, on their daily interactions with the accused and his behavior during confinement. Mental health providers did not witness the acccused's behavior frequently. Instead, mental health providers met with the accused during planned sessions in differently controlled environments. The different conclusions reached by a different provider demonstrate that the Brig staff's concerns had a reasonable basis. Consequently, the Brig staff acted reasonably by implementing rules to keep the accused from harming himself.

IV. CONDITIONS OF CONFINEMENT WERE RELATED TO LEGITIMATE GOVERNMENT INTERESTS

Conditions of confinement are not unduly onerous or egregious if they are related to a legitimate government interest. *See McCarthy*, 47 M.J. at 167. Additionally, conditions of confinement should be determined based on the detainee's individual circumstances. *See King*, 61 M.J. at 228. In the instant case, the legitimate government interest of protecting national security further supports the restrictions of the accused's confinement.

A. Related to Government Interest

Conditions of confinement are not more rigorous than necessary nor the imposition of punishment if they are related to a legitimate government interest. *See Zarbatany*, 70 M.J. at 174 (citing *King*, 61 M.J. at 227-28). The conditions of the accused's confinement were related to nonpunitive, legitimate governmental interests and therefore do not violate Article 13. The government has legitimate interests in, *inter alia*, ensuring the accused's presence at trial,

ensuring the security of the institution, the accused's own safety, and protecting national security. *See Crawford*, 62 M.J. at 416; *McCarthy*, 47 M.J. at 167.

Each of the conditions of the accused's confinement pertained to a legitimate government interest. The defense highlights the accused's limited access to reading material, limited access to toilet paper, inability to exercise in his cell, and forfeiture of glasses as not related to a legitimate governmental objective. *See* Defense Motion ¶ 161-62 (describing the restrictions as "wholly nonsensical"). All restrictions decreased the chance the accused would harm himself. Because a prior detainee may have killed himself with paper, paper products posed a potential danger. The small size of the accused's cell increased the chance of injury if the accused physically trained. The accused could have used the glasses to injure himself and had misused them to remove a portion of his eyebrows.

Additionally, the accused was not isolated, but the accused was confined in conditions to ensure the safe operation of the Brig and to prevent the accused from disclosing protected information. The Defense characterizes the conditions of the accused's confinement as being "tantamount to solitary confinement," but, as the Defense notes, solitary confinement does not exist within military confinement. *See* Defense Motion ¶ 192 & n. 19. The accused was permitted to talk to other detainees. All detainees at the Brig, including the accused, were given their own cells. Furthermore, the accused was permitted to receive visitors and received them in accordance with Brig regulations. *See* Enclosure 22; Enclosure 13. The accused updated his list of authorized visitors and later removed many individuals from his authorized visitors list voluntarily. *See* Enclosure 24 at 6. Conversations with visitors were monitored to prevent further potential disclosure of classified information, another legitimate, nonpunitive government interest. *See* Enclosure 9. The Defense's descriptions of the conditions of the accused's confinement discount the legitimate bases for the restrictive measures.

Confinement with similar conditions was held not violative of Article 13 where the accused was charged with attempted drug possession and breaking restriction. *See King*, 61 M.J. at 225, 229[21] (noting that the accused was charged with attempting to possess cocaine and ecstasy and breaking restriction). In *King*, the accused was placed in MAX custody and was restricted to his cell all day, except for emergencies and appointments; ate all meals in his cell; lacked library and gym privileges;[22] could not sleep in his cell during duty hours; [23] was required to wear a yellow jumpsuit and shackles when released for appointments; watched a television placed outside his cell; and required two escorts, one of whom was armed, whenever he was moved for appointments. *See id.* at 226. Reviewing the conditions of the accused's

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[21] In *King*, the accused received confinement credit for being placed in a segregated environment without any demonstration of cause in the record, let alone an individualized determination. *See King, infra.*

[22] These items were brought to the accused's cell. *See King*, 61 M.J. at 226.

[23] The Defense also notes that the accused could not rest against the walls of his cell. This restriction served the government interest of maintaining order and discipline at the Brig. Detainees are not permitted to sleep during working hours, like all other servicemembers. Accordingly, detainees were not permitted to assume positions that might cause them to fall asleep prematurely. *See* proffered testimony of Brig staff.

confinement, the CAAF held that the confinement facility did not intend to punish the accused nor were the conditions unnecessarily rigorous. *See id.* at 229.

B. Individualized Determination

The Brig commanding officer has the authority and discretion to decide the conditions of confinement and measures necessary to effectuate those conditions. *See Palmiter*, 20 M.J. at 96; *id.* at 99 (Everett, J., concurring) ("Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this."). Confinement facilities must engage in an individualized determination for each detainee and reach a conclusion depending on the facts and circumstances of each detainee. *See King*, 61 M.J. at 228; *see also Crawford*, 62 M.J. at 416 (stating that maximum custody imposed based solely on charges would warrant scrutiny). Here, as noted *supra*, the accused constantly received individualized determinations. Weekly progress reports and C&A Board recommendations document the variables and factors that confinement authorities weighed when determining the appropriate status and custody for the accused. In particular, the confining authorities considered the accused's behavior during confinement and history during confinement at the TFCF. However, subsequent behavior is not solely dispositive of the Brig commanding officer's decision. *See McCarthy*, *supra*.

The conditions of the accused's confinement were not based on a single factor, nor a single legitimate government interest. The accused's behavior at the TFCF alone provided significant justification for the accused's confinement classification and status. *See Crawford*, 62 M.J. at 416 (upholding nine months of maximum custody based on potential length of sentence and threats made by the accused prior to confinement to undercover agents). The length of the potential sentence faced by the accused, which increases his flight risk, provides one basis among several for conditions on his confinement. *See, e.g., id.* at 416 (listing the potential for lengthy confinement as a factor in classifying the accused as a high-risk inmate). Additionally, the seriousness of the charges further validates placing an accused in a restrictive custody status. *See id.* The accused was originally charged with four specifications of violating a lawful regulation, one specification of violating 18 U.S.C. § 793(e), three specifications of violating 18 U.S.C. § 1030(a)(1), and four specifications of violating 18 U.S.C. 1030(a)(2), and then charged with significant violations of the UCMJ, including aiding the enemy, and faces a substantial sentence.[24] *See* Enclosure 10 at 3-7; Charge Sheet. Furthermore, the Brig sought to protect the accused from self harm. Moreover, good behavior does not mandate a downgrade to a less restrictive status.[25] *See Willengbring*, 56 M.J. at 79 (deciding that length of pretrial

[24] Before the current charges were preferred, the accused faced a substantial, albeit lower, potential sentence of 52 years. *See* Enclosure 27 at 3.

[25] The Defense cites *United States v. Fuson*, 54 M.J. 523, 526 (N-M. Ct. Crim. App. 2000), for the proposition that the accused is not a flight risked based on his good behavior. However, *Fuson* simply held that a strained knee requiring medical care did not justify placing the accused in more restrictive confinement. *See Fuson*, 54 M.J. at 527.

confinement coupled with good behavior does not entitle a detainee to a less restrictive custody). Therefore, the accused's custody classification was both individualized and justified.[26]

C. National Security Considerations

Under Navy Instructions, a threat to national security further justifies placing an accused in MAX custody. *See* SECNAVINST 1640.9C Art. 4202(2)(a) at 4-7. The potential ability to execute serious criminal misconduct has supported the decision to place a detainee in MAX custody for nine months. *See Crawford*, 62 M.J. at 416. Furthermore, the MCM contemplates a threat to national security as serious criminal misconduct.[27] *See* RCM 305(h)(2)(B)(iii)(b) (defining national security broadly as "the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert"). Thus, a threat to national security establishes a cognizable basis for placing an accused in MAX custody.

Restrictions on an accused's communications comport with Army and Navy correctional regulations, which grant the authority to monitor non-privileged telephonic communication without regard to national security considerations. *See* U.S. Department of the Army Regulation190-47, The Army Corrections System, para. 10-11 (15 June 2006); *see also* SECNAVINST 1640.9C Art. 8301(4)(c) (granting confining authorities the authority to monitor correspondence). Furthermore, commanders posses broad authority to limit a Soldier's freedom and activity, especially where the Soldier is suspected of having engaged in criminal activity. *See, e.g.*, RCM 304(b); RCM 305(c); RCM 305(g); RCM 305(h)(2); U.S. Department of the Army Regulation 27-10, Military Justice, para. 8-5(a)(1) (granting a commander or military magistrate the authority to release an accused from pretrial confinement); AR 27-10, Military Justice, para. 27-6, (3 October 2011) (granting a commander the authority to detain civilians) [hereinafter AR 27-10]; AR 27-10 para. 27-9 (granting a commander the authority to place a Soldier in pretrial confinement); Department of the Army Regulation 600-20, Army Command Policy, para. 2-1 (4 August 2011) (establishing that commanders are responsible for everything the command does) [hereinafter AR 600-20]; AR 600-20 para. 4-12(c) (granting commanders the authority to prohibit military personnel from engaging in or participating in any activities that will adversely affect good order and discipline or morale); *see also* AR 27-10, para. 27-9 (granting commander authority to determine whether to prefer charges if the Department of

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[26] The Defense cites federal cases claiming due process violations. *See* Defense Motion ¶212. The cases do not pertain to Article 13 and offer no persuasive value. One case found a due process violation for arbitrarily placing detainees in small cells without an individualized determination. *See Lock v. Jenkins*, 641 F.2d 488, 494 (7th Cir. 1981). Two cases cited by the Defense found due process violations for overcrowding, which is inapposite given the Defense's allegations of the accused's confinement being "tantamount to solitary confinement." *See Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980); *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979) (finding conditions of the facility and treatment fell below constitutional standards based on lack of sufficient living space, ventilation, light, heat, noise control, among others). Two more cases simply held that a confinee states a cause of action. *See Lyons v. Powell*, 838 F.2d 28, 29 (1st Cir. 1988); *Magluta v. Samples*, 375 F.3d 1269, 1274 (11th Cir. 2004).

[27] An accused's potential to commit serious criminal misconducts also forms the lawful basis for placing an accused in pretrial confinement. *See* RCM 305(h)(2)(B)(iii)(b) (stating that a commander may direct a prisoner be placed in pretrial confinement if the commander believes the prisoner will engage in serious criminal misconduct).

Justice declines to exercise federal criminal jurisdiction). In particular, commanders possess the authority to order a Soldier not to disclose classified information. *See, e.g.*, AR 600-20, para. 4-12(c). Consequently, commanders possess the authority to place limitations on a Soldier's ability to communicate where that Soldier has been charged with compromising classified information.[28]

Additionally, the federal prison system recognizes measures implemented to protect the legitimate interest of protecting national security and preventing threats thereto. *See* 28 C.F.R. § 501.2(a). Within the federal prison system, the Director, Bureau of Prisons may, upon the direction of the Attorney General of the United States, authorize a warden to implement special administrative measures (SAMs) that are reasonably necessary to prevent the disclosure of classified information by a pre- or post-trial inmate. *See id.* Specifically, these measures may include special housing, limited privileges, and monitoring.[29] *Id.*

After being detained by his chain of command in Iraq, the accused immediately circumvented an order not to access computers and had another Soldier check his personal email. Moreover, all the information the accused has been charged with compromising has not been released in the public domain. Department of State cables that the accused has been charged with compromising were not released during the accused's confinement. *See* testimony of Catherine Brown, *supra*. Any communication by the accused presented a potential threat of further divulging protected information to the public domain. The protected information could have damaged relations with foreign nations, thereby threatening national security. *See id.* Additionally, any communications, including those related to his passwords, to known or unknown third parties would adversely impact the ongoing joint investigation between the U.S. Army CID, Federal Bureau of Investigation, and the Department of State Diplomatic Security Service. Any adverse impact to the investigations could have made preventing additional disclosures that could harm national security more difficult.

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[28] Although SECNAVINST 1640.9C recognizes the legitimate government interest of national security, it does not specify procedures for protecting that interest.

[29] 28 C.F.R. § 501.2(a) specifically states:

> "Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to prevent disclosure of classified information upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to prevent the disclosure of classified information. The authority of the Director under this paragraph may not be delegated below the level of Acting Director."

In this instant case, the Department of Justice declined to assert primary jurisdiction and permitted the Department of the Army to prosecute the accused for the charged acts. Accordingly, SAMs can be instituted without Director approval because Soldiers are subject to different standards under the UCMJ than civilians under federal law.

Here, the accused has been charged with compromising hundreds of thousands of protected documents and has appropriately been placed in MAX custody. Monitoring the accused ensures the U.S. Army protects evidence from being compromised, destroyed, or abandoned.[30] Furthermore, the monitoring did not prohibit the accused from communicating because the Brig permitted the accused to receive visitors and engage in correspondence. Ultimately, the restrictions were related to government interests and therefore were neither unduly rigorous nor arbitrary.

V. ACCUSED'S CONFINEMENT DID NOT VIOLATE THE CONSTITUTION

Article 13's prohibition of pretrial punishment meets the constitutional protections of the Due Process Clause. *See James*, 28 M.J. at 215-16 (citing *Bell*, 441 U.S. at 535) ("Article 13 prescribes that '[n]o person . . . held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him.' It further prescribes that the arrest or confinement 'shall [not] . . . be any more rigorous than the circumstances require to insure his presence . . . .' This standard is conceptually the same as those constitutionally required by the Due Process Clause of the Constitution."). Accordingly, confinement that does not offend Article 13's protections also satisfies the Due Process Clause.

Furthermore, the accused's confinement did not violate the Eighth Amendment. To demonstrate a violation of the accused, the Defense must prove that the deprivation alleged is sufficiently serious and resulted in the unnecessary and wanton infliction of pain. *See United States v. Avila,* 53 M.J. 99, 101 (C.A.A.F. 2000) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1981). The Defense demonstrates neither. Confinement conditions similar to the accused's have been found not to violate the Eighth Amendment. *See United States v. Avila,* 53 M.J. at 100-01 (describing conditions of residing in a windowless cell, not being allowed to communicate with other inmates, only being permitted one hour of recreation per day for five days a week, being required to wear handcuffs and shackles when escorted outside his cell, and receiving visitors with a Plexiglass barrier between them). Deliberate indifference to serious medical needs violates the Eighth Amendment. *See Avila*, 53 M.J. at 101 (citing *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976)). Here, the Brig actively sought to provide the accused with regular health care, to include having a psychiatrist visit the accused on a weekly basis. Because the accused was not deprived of any necessities, the Brig upheld the accused's Eight Amendment rights.

VI. MEANINGFUL RELIEF DETERMINED IN CONTEXT OF SERIOUSNESS OF ACCUSED'S CHARGED ACTS

Meaningful relief depends on the nature of the Article 13 violations, the harm suffered by the accused, and whether the relief sought is disproportionate to the harm suffered or in light of the of the offenses for which the accused is convicted. *See Zarbatany*, 70 M.J. at 176-77 (citing *United States v. Harris*, 66 M.J. 166, 169 (C.A.A.F. 2008). The relief sought cannot be disproportionate to the harm suffered by the accused. *See Harris*, 69 M.J. at 169. In the instant case, the accused has abided two technical violations of Navy Instructions because his status was not promptly downgraded from SR to POI following determinations by the medical officer.

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[30] The accused and Defense counsel have acknowledged the monitoring on many occasions. *See* Enclosure 13.

Accordingly, the United States stipulates that the accused is entitled to confinement credit and that the credit should be no more than one-for-one because the decision to place the accused on SR conformed with Brig regulations. *See Williams*, *supra*. The accused has sustained no other violations of Article 13.

However, assuming, *arguendo*, the Court determines the accused has sustained additional violations and is entitled to confinement credit, the credit should be one-for-one in accordance with *Williams*. In *Williams*, the confining facility committed two violations of Article 13 by denying the accused sufficient access to a psychiatrist as required by Air Force regulations, and failing to remove the accused from suicide watch after a medical officer determined it was unnecessary. Three-for-one credit has been found appropriate where the Government provided no evidence it explored alternatives, nor explained why the accused was placed in a segregated environment because the detainee did not receive an individualized determination. *See King*, 61 M.J. at 229. Here, the Brig has provided substantial explanation and evidence as the bases of its determinations to place and maintain the accused in MAX custody and POI.

The Defense requests dismissal of all charges, but that remedy is disproportionate where the accused is charged with repeated and voluminous compromises of protected information and only endured two technical violations lasting seven days in total. Out of thirty-four documented command visits, the accused personally discussed his status with his command on only two occasions. When the command asked, the accused rarely discussed the issues the Defense now alleges. In fact, the accused only personally raised the issues during the time when Defense Counsel began submitting filings regarding his confinement. The accused immediately ceased raising his status after Defense counsel submitted its filings in January 2011. Furthermore, when presented the opportunity to discuss the conditions of his confinement with his visitors, the accused never discussed nor alluded to mistreatment. *See* Enclosure 49. Failure to complain is "strong evidence" that the accused was not punished. *See Huffman*, 40 M.J. at 227. In fact, the accused described his treatment by the guards and facilities, and lack of use of the grievance process, similarly for both the Brig and JRCF. *See* Enclosure 26 at 82-86 (stating for both facilities that he understood the grievance process and had not had to use it). The accused signed all these statements. *See* Enclosure 26.

The Defense notes that the accused faces a life sentence, but Article 13 does not require the accused receive substantive relief where the relief would be disproportionate to the harm the accused suffered and seriousness of the crimes with which he has been charged. *See Harris*, 66 M.J. at 169 (declining to provide additional relief other than confinement credit where the accused had finished serving his sentence because the relief would have been disproportionate). In the alternative, the Defense requests the disproportionate remedy of ten-for-one based on dicta describing a remedy not employed for a violation of denial of mental health care. *See Zarbatany*, 70 M.J. at 172 (quoting the opinion of the military judge). Here, the Brig always acted with the intent of ensuring the accused's safety and not with an intent to punish. Furthermore, the Brig provided the accused with regular access to mental health providers. Ten-for-one credit would be disproportionate.

CONCLUSION

Navy Instructions, Brig SOP, and military case law vest discretion in the confining authorities to determine the conditions of a detainee's confinement to ensure his safety. The regulations specifically define medical officers as advisers to the Brig commanding officers and only grant decision-making authority to medical officers in limited circumstances, such as decisions regarding quarantining detainees. The confining authorities considered many factors, to include, *inter alia*, the accused's prior suicidal ideations, the recommendations of the medical officers, and the accused's behavior, and repeatedly gave the accused an individualized determination regarding the conditions of his confinement. The confining authorities reached reasonable conclusions in setting the conditions of the accused's confinement, and courts grant deference to those conclusions. Moreover, the conditions were related to legitimate government interests to include, *inter alia*, protecting national security and the accused's safety. The accused's confinement was not more onerous than necessary. The accused is entitled to **no more than seven days confinement credit** for the time he spent on SR after a psychiatrist recommended removing him from SR. Therefore, the accused's confinement did not otherwise violate Article 13 and the accused is not entitled to additional confinement credit.

For the foregoing reasons, the Government respectfully requests that the Court deny the Defense Motion.

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MAJ, JA
Trial Counsel

Enclosures
1. Handling Instructions
2. Manning Behavior MFR
3. Mental Health Record
4. Article 15, dated 100517
5. AIR
6. (b) (7)(C) R. S. MFR and Statement
7. Kuwait Transfer Docs
8. Confinement Order
9. Request for Monitoring of Communications
10. Mar Coffman Memo

11. Reply from Quantico for Monitoring
12. Email from Mr. Coombs
13. Acknowledgements
14. Inmate Inprocessing
15. Inmate Observation Report
16. Use of Force Downing Memo
17. Kuwait
18. Barr MFR, dated 100729
19. Initial Classification
20. Inprocessing Forms
21. Behavioral Health Evaluations
22. Weekly Reports
23. Averhart 16 Mar Response
24. O&E Reports
25. Zelek Memo, dated 101228
26. Command Visits
27. Choike memo, dated 110301
28. Choike Memo, dated 110408
29. Averhart Repsonse, dated 110124
30. Oltman Response
31. Final Action by Assistant Secretary Garcia regarding Article 138
32. C&A Boards
33. Guard Statements, dated 110118
34. Incident Report (Webb), dated 110118
35. Averhart Response, dated 110316
36. Suicide Video, Pt 1.MOD
37. Suicide Video, Pt 2.MOD
38. Barnes Response, dated 110302
39. Galaviz Memo, dated 110223
40. Papakie Statement, dated 110302
41. Suicide Gown Incident Report
42. Tweezer Incident Report
43. SPCMCA Request to Reduce POI, dated 110121
44. Headset Receipt
45. JRCF Flight Report
46. JCRF Attack.avi
47. SECNAV Instruction 1640.9C
48. Brig SOP, dated 100701
49. Audio, with Cover Sheet

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 17 August 2012.

ALEXANDER S. VON ELTEN
CPT, JA
Assistant Trial Counsel